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No. 80-

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE F. JEWETT, JR.
and
LUCILLE M. JEWETT,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I

Questions Presented For Review

1. Is a disclaimer of a contingent remainder interest under a trust, made during the lifetime of the life beneficiary, a taxable transfer for federal gift tax purposes?

2. Under Treasury Regulation §25.2511-1(c) does the "reasonable time" for disclaimer of a contingent remainder interest begin to run from the date of creation of the remainder interest or from the date of death of the life beneficiary?

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners George F. Jewett, Jr. and Lucille M. Jewett respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 9, 1980.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 638 F.2d 93 (9th Cir. 1980), 47 AFTR 2d 151, 212, and is attached hereto as

Appendix pages A-1 through A-6. The opinion of the United States Tax Court is reported at 70 T.C. 430 (1978), CCH Tax Ct. Dec. 35,213 (1978), and is attached hereto as Appendix pages A-7 through A-19, as amended by Order attached hereto as Appendix pages A-23 through A-25.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered and entered on December 9, 1980. A petition for rehearing was denied by Order entered on February 18, 1981. The jurisdication of this Court is invoked pursuant to 28 U.S.C §1254(1).

Statutes And Regulations

I.R.C. §2501. Imposition of Tax.

(a) TAXABLE TRANSFERS. —

(1) GENERAL RULE. — A tax, computed as provided in section 2502, is hereby imposed for each calendar quarter on the transfer of property by gift during such calendar quarter by any individual, resident or nonresident.

* * *

I.R.C. §2511. Transfers in General.

(a) SCOPE. — Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

* * *

Treasury Regulation §25.2511-1 (c), 26 C.F.R. §25.2511-1(c): The text of 26 C.F.R. §25.2511-1(c) is set forth at Appendix page A-30.

Statement Of The Case

1. Statement of Facts

The testatrix died on January 14, 1939, leaving a will which created a trust for the benefit of her husband during his lifetime and thereafter for the benefit of her son and her daughter-in-law (George F. Jewett, Jr.'s mother) during their lifetimes (A-21). On the death of the survivor of the son and daughter-in-law the will directs distribution of the remainder to the then-living children of the son; the share of any then-deceased child is to be distributed to the child's issue.

Two of the life beneficiaries died prior to 1972. (A-21) The remaining life beneficiary, the mother of petitioner George F. Jewett, Jr. (hereinafter "Jewett"), is still living. (A-21)

Under the trust Jewett becomes entitled to a share of the trust remainder only if he survives his mother.

In 1972, while his mother was still alive, Jewett executed disclaimers of his contingent remainder interest in the trust (A-21 — A-22). Those disclaimers were unequivocal and effective under state law. (A-3)

Jewett and his wife disclosed the disclaimers on their 1972 United States Gift Tax Returns, but did not report them as taxable transfers for federal gift tax purposes. (A-10)

In February 1976, the Internal Revenue Service issued Notices of Deficiency asserting that the disclaimers were taxable transfers. (See A-10—A-11)

2. PROCEEDINGS BELOW

On May 5, 1976, petitioners filed a Petition in the United States Tax Court for the redetermination of the deficiencies determined by the I.R.S. Jurisdiction in the Tax Court existed pursuant to 26 U.S.C. §7442 and §6213. That Petition alleged that the Notices of Deficiency erroneously determined that the disclaimers were taxable transfers for federal gift tax purposes.

On June 13, 1978, the Tax Court filed an Opinion (A-7) holding that Jewett's disclaimers were taxable transfers for federal gift tax purposes. The Tax Court conceded that the disclaimers were unequivocal and effective under state law (A-12), but asserted that they were not timely under Treasury Regulation §25.2511-1(c), because the "reasonable time" provision of that Regulation must be measured from the date of death of the testatrix (in 1939) rather than from the date of the death of the life beneficiary (who is still living) (A-14, A-15).

Petitioners filed a Motion for Reconsideration, which was denied on July 19, 1978 (A-26). Also on July 19, 1978, the Tax Court issued an Order amending its July 13, 1978 Opinion in certain respects, without changing the result (A-23).

On August 17, 1978, Decision was entered by the Tax Court in accordance with its Opinion of June 13, 1978, as amended (A-27).

On November 13, 1978, Appellants filed their Notice of Appeal to the Court of Appeals for the Ninth Circuit.

In an Opinion filed on December 9, 1980, from which one Judge dissented (A-6), the Court of Appeals for the Ninth Circuit affirmed the decision of the Tax Court (A-1), stating that a disclaimer of a contingent remainder interest must be made within a reasonable time after knowledge of the transfer to the disclaimant. It held that the relevant "transfer" was the creation of the contingent remainder interest (by the death of the testatrix 33 years before) rather than possible transfer of the

trust property to Jewett upon the death of the life beneficiary (which event had and has not occurred). In so holding the Opinion expressly disagreed with the decision of the United States Court of Appeals for the Eighth Circuit in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973). (A-4).

On December 19, 1980, petitioners filed a motion for rehearing and suggestion for rehearing *en banc*. That motion was denied on February 18, 1981. (A-29)

Reasons For Granting The Writ

I. The Decision of the Court of Appeals for the Ninth Circuit Expressly Contradicts Prior Decisions of the Court of Appeals for the Eighth Circuit and Results in Nonuniform Application of Federal Tax Law.

The decision of the Court of Appeals for the Ninth Circuit directly and expressly contradicts the only other Circuit Court of Appeals authority in point, the decisions of the Eighth Circuit in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) and *Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (*en banc*). In those discussions, the Eighth Circuit held that the "reasonable time" provision of Treasury Regulation 25.2511-1(c) must be computed from the date of death of the life beneficiary and not from the date of the creation of the remainder interest.

A transfer or gift presupposes that the donor possesses property. In contrast, disclaimer is a refusal to *accept* the ownership of property or property rights. *Bel v. United States*, 452 F.2d 683, 693 (5th Cir. 1971); *City National Bank & Trust Co. v. United States*, 203 F. Supp. 398, 402 (S.D. Ohio 1962) aff'd, 312 F.2d 118 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963). A disclaimer occurs prior to ownership.

Treasury Regulation §25.2511-1(c) recognizes this fundamental difference between a refusal to accept property *ab initio* and the disposition of property already owned:

> "(c) .... Where the law governing the administration of the decedent's estate gives a beneficiary ... a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent ... a refusal to accept ownership does not constitute the making of a gift if the refusal is made *within a reasonable time after knowledge of the existence of the transfer.* The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance. .... In the absence of facts to the contrary, if a person fails to refuse to accept a *transfer to him of ownership of a decedant's property* within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property...." (emphasis added)

The central issue in this case is whether the computation of the "reasonable time" allowed by the Regulation is from the establishment of a trust identifying the taxpayer as having a contingent remainder interest, or from the death of the life beneficiary, when ownership of the trust property passes to the taxpayer. As noted above, that precise issue was decided by the Court of Appeals for the Eighth Circuit in 1973, in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973).

In that case, 19 years after the death of the testator but less than six months after the death of the life beneficiary, a remainderman filed a disclaimer of his interest which was held timely and valid under state law. As in this case, the Commissioner contended that the disclaimer constituted a taxable transfer for federal gift tax purposes because the taxpayer failed to disclaim within a "reasonable time" after the death of the testator. The Tax Court agreed, 58 T.C. 352 (1972). However, on appeal the Eighth Circuit reversed and held that the "reasonable time" period commences on the death of the life beneficiary, and that the taxpayer's disclaimer was filed within a "reasonable time" after her death. In doing so it adopted the reasoning behind the common law rule that a disclaimer can be made after the death of the life beneficiary:

> [T]he holder of a vested remainder interest subject to divestiture has a *reasonable time* within which to renounce or disclaim the remainder interest *after the death of the life beneficiary* and that an unequivocal disclaimer filed within six months thereof is made within a reasonable time .... In the instant case the remainderman ... had really nothing to accept or renounce by way of beneficial ownership or control of the property until he succeeded in outliving the life beneficiary .... 480 F.2d at 64 (emphasis added.)

The *Keinath rule* was recently reaffirmed by the Eighth Circuit, sitting *en banc, in Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980), where the Court found that the facts of the case were "indistinguishable in any material respect" from *Keinath* and that *Keinath* was controlling. *Id.* at 1128.

In the instant case, the Ninth Circuit has expressly rejected the rule established by the Eighth Circuit in *Keinath* and reaffirmed in *Cottrell*. After discussing *Keinath*, the Ninth Circuit stated "We must respectfully disagree," and, without any further explanation, held that the timeliness of the disclaimer for federal tax purposes was measured from the creation of the trust rather than from the death of the life beneficiary (A-4, A-5). In his dissent Judge Harris pointed out the resultant split between holdings of the two Circuits, and argued that the majority should have followed *Keinath* and *Cottrell* (A-6).

Nationwide uniformity in the application of federal tax law is a matter of great importance. This Court should act to resolve the direct conflict between the decisions of the two Circuit Courts of Appeals created by the Ninth Circuit's decision.

II. The Ninth Circuit's Decision Creates a Federal Rule of Disclaimer Which is in Conflict with the Law of More Than 27 States and Which Finds No Support in the Laws of Any State.

The statutes of at least 27 states expressly provide that disclaimers of contingent remainder interests can be made

before the expiration of a certain period of time (generally six or nine months) after the death of the life beneficiary.[1] Other states, as a matter of common law, have adopted the same principle. E.g., *Coleman v. Burns*, 103 N.H. 313, 171 A.2d 33 (1961) (New Hampshire). Page, Law of Wills, §49.8 (Bowe-Parker ed. 1962).

The Ninth Circuit's assertion that the timeliness of a remainderman's disclaimer must be measured from the creation of the remainder interest rather than the death of the life beneficiary finds no support in state law or, as noted above, in the law of other Circuits. The Eighth Circuit could find no such authority, *Keinath v. Commissioner*, *supra*, 480 F.2d at 64, and the Ninth Circuit did not cite a single case, statute or secondary authority to support its conclusion. (A-4, A-5).

Until the decision below, persons contemplating a disclaimer of a contingent remainder interest could reasonably wait until the death of the life beneficiary before deciding whether to disclaim. No federal statute or regulation expressly conflicted with that principle,[2] and until 1978 the only decision of the Tax Court to the contrary had been reversed on that precise issue by the Eighth Circuit in *Keinath*.

The Ninth Circuit has judicially created a rule so removed from state law that Jewett, who justifiably believed that his disclaimer would not be a taxable gift, and who had not even reached the point at which a decision on a disclaimer had to be made, belatedly discovers that his disclaimer should have been made thirty years earlier, and in fact twenty years before Treasury Regulation §25.2511-1(c) was promulgated.

This Court should act to prevent the judicial creation of such a paradoxical and inequitable result, and to avoid such an unnecessary conflict between federal and state law concepts.

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[1] See statutes cited *infra* at App. A-32.

[2] The Tax Reform Act of 1976, P.L. 94-455, §2009(e)(2), did effect a material change as to contingent remainder interests created after 1976, as discussed *post* at 15.

III. If the Conflict Between the Circuits is Not Resolved, A Substantial Volume of Major Tax Litigation Will Result and Uncertainty Over the Federal Tax Law Will Extend Into the Twenty-First Century.

A decision which reverses the rules which taxpayers have followed for over forty years and which conflicts with an unambiguous decision of a United States Court of Appeals rendered seven years ago is a matter of serious concern to taxpayers and tax practitioners alike, especially those within the jurisdiction of the Ninth Circuit or of the various Circuits which have not yet chosen between the Ninth Circuit and the Eighth Circuit positions. As Judge Harris recognized in his dissent:

> "... *Keinath v. C.I.R.*, 480 F.2d 57 (8th Cir. 1973), followed by the Eighth Circuit *en banc* in *Cottrell v. Commissioner*, _____ F.2d _____ (1980), has been the only precedent from a Court of Appeals since its decision in 1973. Numerous tax practitioners have undoubtedly relied on this opinion in advising as to the tax consequences of such acts as are involved in the instant case, and justifiably so." (A-6)

A number of other cases, appealable to various Circuit Courts of Appeals, are already pending in the Tax Court on this issue.[3] The number of disclaimants or potential disclaimants awaiting clarification of the law, or at least the position adopted in various Circuits, is limited only by the number of individuals throughout the country who are contingent remaindermen under trusts created prior to 1977.

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[3] *Eleanor A. Ooten Ward Clark v. United States*, T.C. docket no. 3152-79; *Adelaide C. Griswold v. United States*, T.C. docket no. 12976-79; *Eleanor C. Hallenbeck v. United States*, T.C. docket no. 12879-79; *James R. Houghton v. United States*, T.C docket no. 12878-79; *Amory Houghton, Jr. v. United States*, T.C. docket no. 12880-79.

For persons who have already disclaimed the importance of the issue may be staggering — it is the difference between paying no tax and being liable for a gift tax on property which they have never possessed, enjoyed, controlled or benefited from and which is by definition not available to them for payment of the gift tax liability in issue.

The Ninth Circuit may have thought that the Tax Reform Act of 1976, P.L. 94-455, described in part V *post* (p. 15) resolved this issue. However, it affects only interests created after December 31, 1976. P.L. 94-455, §2009(e)(2), 90 Stat. at 1896. Interests created prior to 1977 will still be governed by the law of *Keinath* or the law of this case, depending on which rule other Circuits follow. Unless the conflict in the Circuits is resolved, it is reasonable to expect, in view of normal life expectancies and with the examples of the enviable longevity of the life beneficiaries in this case and in *Keinath*, that litigation under the pre-1976 law will continue to arise well into the twenty-first century.

IV. The Ninth Circuit Incorrectly Held That a Disclaimer by a Contingent Remainderman During the Lifetime of the Life Beneficiary was a Taxable Gift.

A. *The Ninth Circuit's Opinion Produces an Inconsistent and Anomalous Result.*

If Jewett had made his disclaimers at any time prior to 1958, even the Ninth Circuit would not have considered it to be a gift for federal tax purposes. Until then, the federal gift tax treatment of disclaimers was apparently straightforward — if a disclaimer was effective and timely under the governing state law it was not a taxable gift for federal tax purposes. *Brown v. Routzahn*, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933). In *Commissioner v. Vease's Estate*, *supra*, 314 F.2d at 88, the Ninth Circuit recognized the validity of that rule:

> "It was there [in *Brown v. Routzahn*] laid down that the federal tax on transfers ... is levied on the transfer of property; not on the exercise of a right to renounce testamentary gifts. Accordingly, if under local law a legatee or devisee has the option of accepting or rejecting his testator's bounty, rejection of the gift does not result in a taxable transfer to its residuary recipient. 314 F.2d at 88.

In 1958, Treasury Regulation §25.2511-1(c), 23 Fed. Reg. 8904 (11/15/58), was first published. The Ninth Circuit now concludes that the Regulation mandates that Jewett, who could have disclaimed without gift tax liability at anytime prior to 1958, now was unable to disclaim without paying a gift tax because he had not disclaimed in 1939 when the trust was created. That result is so unreasonable as to appear arbitrary. The Ninth Circuit's failure even to acknowledge the precedent it had established for itself in *Commissioner v. Vease's Estate, supra*, reinforces that suggestion of fundamental unsoundness.

B. *The Ninth Circuit's Opinion Lacks the Reasoned Underpinnings of the Keinath Rule.*

In *Keinath v. Commissioner, supra*, the Eighth Circuit gave a thoroughly reasoned explanation for its holding. It noted there was no federal statute or regulation defining "reasonable time" and, accordingly, that federal courts could look to state law for guidance. 480 F.2d at 61. It found that Treasury Regulation §25.2511-1(c) imposed conditions which "are but a codification of common law principles applicable to the doctrine of disclaimer ...." 480 F.2d at 61.

After analyzing the applicable state disclaimer statute and other state statutes and precedents, the Eighth Circuit concluded that for federal gift tax purposes the reasonable time period for disclaimer commences only when the death of the life

beneficiary fixes the remainderman's interest in the testatrix's property. 480 F.2d at 64.[4]

In contrast, the reasoning of the Ninth Circuit Opinion appears to have been as follows:

1. A contingent remainder interest subject to divestiture is "property" the transfer of which would be subject to the gift tax. (A-2)

2. The federal standard of timeliness is imposed over and above state law requirements.(A-5)

3. Under federal law, the disclaimer had to be made within a reasonable time after the "transfer" (actually, the creation) of the contingent remainder interest to the disclaimant. (A-5)

Points 1 and 2 are correct but do not logically lead to point 3. In fact, there is no explanation whatsoever of the rationale for the holding in point 3. That lack of explanation is especially troubling because it contradicts the apparently plain language of Treasury Regulation §25.2511-1(c) that the "transfer" from which the reasonable time period runs is "the transfer to [the taxpayer] of *ownership of a decedent's property.*" (emphasis added) Giving these words their common meaning, a transfer of "ownership of the decedent's property" to the remainderman cannot take place until the death of the life beneficiary.

C. *The Ninth Circuit's Opinion Confuses A Disclaimer With A Voluntary Transfer.*

The effect of the Ninth Circuit's opinion is to equate a disclaimer with a voluntary transfer. That equation obscures the fundamental difference between the two. In a voluntary transfer, the transferor selects the recipients of the property while in contrast a disclaimant does not control the further dis-

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[4] *See also, Estate of Rolin v. Commissioner*, 68 T.C. 919 (1977), aff'd, 588 F.2d 368 (2d Cir. 1978).

position of the property he has refused. As the Tax Court itself recognized,

> "... the Federal gift tax is concerned with *control* over the disposition of property and with exercises of the right to determine who should enjoy the fruits of ownership of property" (A-16), citing H.R. Rep. No. 708, 72d Cong., 1st Sess., 1939-1 C.B. (Part 2) 457, 476-77, S. Rep. No. 665, 72nd Cong., 1st Sess., 1939-1 C.B. (Part 2) 496, 524-525, and *Smith v. Shaughnessy*, 318 U.S. 176, 180 (1943) (emphasis added).

The selection of the recipients of the property by the donor is the essence of "control" over the property which results in a taxable gift. See *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939); *Richardson v. Commissioner*, 126 F.2d 562 (2d Cir. 1942).

In *Commissioner v. Vease's Estate*, 314 F.2d 79, 88 (9th Cir. 1963), the Ninth Circuit articulated the crucial distinction between a disclaimer and a voluntary transfer:

> It is one thing to say that a testamentary beneficiary may reject a part of his gift, ... without making a transfer to the residuary beneficiary. Leaving a larger estate to be shared by others need not constitute a transfer in any sense of the word. 314 F.2d at 88.

In the instant case the Ninth Circuit ignores its own careful articulation of this distinction. Here the persons who will receive the disclaimed property on the death of the last life beneficiary are fixed by the will of the testatrix, not by the terms of Jewett's disclaimers. Those disclaimers merely renounced any future right to receive the corpus of the trust; they did not and could not have purported to direct who would be entitled to receive it. In fact, even the identity of those ultimate recipients cannot be determined until the death of the last life beneficiary.

Jewett never exercised "control" over the disposition of the property and, therefore, did not "transfer" the testatrix's property.

D. *The Ninth Circuit's Opinion Contravenes Congressional Intent That The Gift Tax Law Complement the Estate Tax.*

In interpreting a regulation which is not clear on its face, federal courts should look to the intent behind the statute the regulation is purporting to enforce. *Trustees of Indiana University v. United States*, 618 F.2d 736, 739 (Ct. Cl. 1980). "... [A] regulation must be interpreted so as to harmonize with ... and not to conflict with the objectives of the statute it implements." *Id. See United Telecommunications, Inc. v. Commissioner*, 589 F.2d 1383, 1390 (10th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1118 (10th Cir. 1977).

The gift tax was originally adopted as a "corollary" or as "supplemental" to the estate tax. 65 Cong. Rec. 3119, 3120, 3122, 3172, 8095, 8096 (1924). The purpose of its enactment was "to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter-vivos which, but for the gifts, would be subject ... to the tax laid upon transfers at death." *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939). The intent of Congress was to achieve a "unified scheme of taxation of gifts whether made inter-vivos or at death." *Id.* at 48; R. Paul, *Federal Estate and Gift Taxation*, §15.04 (1942).

The federal gift tax and the federal estate tax "are *in pari materia* and must be construed together." *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939). The federal gift tax, I.R.C. §2501, taxes "the transfer of property by gift"; the federal estate tax, I.R.C. §2033, taxes "all property to the extent of the interest therein of the decedent at the time of his death." If the taxpayer does not transfer property during his lifetime,

that "property" will remain in his estate, and be subject to the federal estate tax at his death.

It is well settled that a contingent remainder interest is not "property" includable in the remainderman's gross estate if he dies prior to the life beneficiary. *Estate of Williams v. Commissioner*, 62 T.C. 400 (1974). See also *C.A. Lee v. United States*, 63-1 USTC ¶12,128 (S.D. Tex. 1962).

If Jewett predeceased his mother, the testatrix's property would not have been subject to federal estate tax as part of his estate because her property never came into his estate. Similarly, Jewett's disclaimer will prevent the testatrix's property from ever coming into his estate. In either circumstance the testatrix's property will pass to others in accordance with the terms of her will. Yet the Ninth Circuit would impose a gift tax in the one instance (disclaimer) while no estate tax would be imposed in the event of Jewett's death.

Instead of creating "a unified scheme of taxation," the Ninth Circuit's opinion creates confusion and disharmony between the estate and gift taxes.

V. The Ninth Circuit Decision Would Give Impermissible Retroactive Effect to a Statute Which Congress Intended to be Prospective Only.

Under the Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520, Congress added Section 2518 to the Internal Revenue Code, which dealt specifically with the question of the timeliness of disclaimers. However, that new section is effective only as to interests created after December 31, 1976. P.L. 94-455, §2009(e)(2), 90 Stat. at 1896. The Committee Reports indicate that Congress recognized *Keinath* as a statement of the law governing interests created before 1977. H.R. Rep. No. 1380, 94th Cong., 2d Sess. 66, reprinted in 1976 *U.S. Code Cong. & Admin. News*, Vol. 4, 3420.

Judge Harris in his dissent expressly articulated the problem of retrospectivity that the majority decision created:

> "The Congress, in the Tax Reform Act of 1976, acted to override the *Keinath* rule, but only prospectively. The effect of the decision of the majority is to give to the 1976 Amendments the retrospective effect which the Congress expressly rejected." (A-6)[5]

By rejecting the application of the *Keinath* rule to a pre-1977 trust, the Ninth Circuit contravened the Congressional intent that its amendment of the law in response to *Keinath* be applied prospectively only.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 9, 1980.

Dated: March 24, 1981.

Respectfully submitted,

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[5] Petitioners disagree with Judge Harris' assertion that the Tax Reform Act of 1976 overrode *Keinath*. Even if it did, however, the new rule was manifestly prospective only.

APPENDIX

Filed: Dec. 9, 1980

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-3621

GEORGE F. JEWETT, JR., AND
LUCILLE M. JEWETT,
PETITIONERS-APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE.

ON PETITION TO REVIEW A DECISION OF THE
TAX COURT OF THE UNITED STATES

Argued and submitted November 12, 1980

Before:
BROWNING and MERRILL, *Circuit Judges*,
and HARRIS,* *District Judge*

OPINION

MERRILL, *Circuit Judge*:

This is an appeal from a decision of the Tax Court holding that appellant George F. Jewett, Jr., made taxable gifts when he executed disclaimers of his remainder interest in a testamentary trust.[1] We affirm.

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* Honorable Oren Harris, Senior United States District Judge of the Eastern and Western Districts of Arkansas, sitting by designation.

[1] Lucille M. Jewett elected to consent to treat the gifts made by her husband, George F. Jewett, Jr., during the taxable year 1972 as having been made by both husband and wife to the extent allowed by law. She is therefore an appellant in this action.

The facts are not in dispute. Appellant's grandmother, Margaret Jewett, a resident of Massachusetts, died in 1939, and by her will created a trust with income to go to her husband, James, during his lifetime, and thereafter to her son, George, and his wife, Mary, during their respective lifetimes. Mary is now the sole surviving life tenant. When she dies, Margaret Jewett's will provides for distribution of the trust corpus in equal shares to the children of George and Mary then living. Appellant George F. Jewett, Jr., is one of those children. In 1972, he executed two disclaimers, the first for 95 percent and a later one for the remaining 5 percent of his interest in the trust remainder. The parties have stipulated that appellant thus had no share in the trust remainder after December 14, 1972.

The issue in this case is whether these disclaimers are subject to gift tax under applicable law. 26 U.S.C. §2501 provides in part: "A tax * * * is hereby imposed * * * on the transfer of property by gift * * *."

Section 2511(a) makes it clear that the tax imposed by §2501 is to cover all types of property interests. The tax "shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible * * *." A contingent remainder subject to divestiture, such as appellant's, is not excepted.

Treas.Reg. §25.2511-1(c) reads in part:

> "(c) The gift tax also applies to gifts indirectly made. Thus all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or

by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [*sic*] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin."[2]

It is undisputed that the disclaimer was effective under Massachusetts law, the law governing the administration of the estate. The only question presented is whether the disclaimer was made within a reasonable time after knowledge of the transfer. This, in turn, depends on our con-

[2] Although it is only applicable to transfers creating an interest in the person disclaiming made after December 31, 1976, the Tax Reform Act of 1976, Pub.L. No. 94-455, §2009 (26 U.S.C. §2518) adopts the substance of Treas.Reg. §25.2511-1(c), and in the interest of uniformity substitutes nine months for the "reasonable" standard of timeliness. It provides in part:

"(a) General Rule.—For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) Qualified disclaimer defined.—For purposes of subsection (a), the term 'qualified disclaimer' means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains the age 21,

(3) such person has not accepted the interest or any of its benefits, * * *"

struction of the word "transfer." If it refers to the date when the interest created by the trust was established, the disclaimer clearly was not timely. If "transfer" means the acquisition of a vested interest by virtue of the death of the life beneficiary, then the disclaimer was timely, since the life tenant is still living.

Appellants contend that a disclaimer valid and effective under state law is not a taxable transfer for federal gift tax purposes and that the "reasonable time" to which the regulation refers is measured from the time when the remainderman comes into his right to possess and control the property—in this case, after the death of the life beneficiary. Appellants rely on *Keinath* v. *C.I.R.*, 480 F.2d 57 (8th Cir. 1973).[3]

In *Keinath*, the court characterized the requirements of the regulation that the disclaimer be unequivocal and effective under local law, and that it be made within a reasonable time as "but a codification of common law principles applicable to the doctrine of disclaimer." *Id.* at 61. Absent a federal statute or regulation defining "reasonable time," the court held that it must look to the law of the state for guidance. This inquiry led it to conclude that:

> "* * * under the prevailing common law and, in particular, the jurisdiction of the State of Minnesota the holder of a vested remainder interest subject to divestiture has a reasonable time within which to renounce or disclaim the remainder interest after the death of the life beneficiary and that an unequivocal disclaimer filed within six months thereof is made within a reasonable time."

Id. at 64. We must respectfully disagree.

State law does indeed generally recognize as valid a disclaimer of a contingent remainder if it is made within a

[3] *Keinath* has been recently followed by the Eighth Circuit *en banc* in *Cottrell* v. *Commissioner*, __ F.2d __ (1980). The question there was whether the rule in *Keinath* applied where the holder of a contingent remainder interest also had a general power of appointment. As to the issue before us, the holding of *Keinath* was not challenged, and was accepted by the court as controlling.

reasonable time after the remainder interest has vested unconditionally. Timeliness there relates only to the validity and effectiveness of the disclaimer. The federal regulation, however, has a different concern. It proceeds upon the assumption (actually, the requirement) that the disclaimer is valid under state law and thus has met the requirements of local law as to timeliness, whatever they may be. The question under the federal regulation, then, is not whether the disclaimer is valid, but whether, as a valid disclaimer, it is taxable as a gift. The timeliness requirement of the regulation is over and above the requirements of state law.

We hold that "transfer" as used in the regulation means the transfer to the disclaimant of the property interest disclaimed by him. In this case, that transfer took place in 1939 when the appellant received a contingent remainder from his deceased grandmother's estate. Appellant had "knowledge of the existence of [that] transfer" for approximately 33 years before he attempted to disclaim the property in 1972. For the purposes of the gift tax, we hold that the disclaimer was not made within a reasonable period of time.

Judgment affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-3621

GEORGE F. JEWETT, JR., AND
LUCILLE M. JEWETT,
PETITIONERS-APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE.

ON PETITION TO REVIEW A DECISION OF THE
TAX COURT OF THE UNITED STATES

DISSENT

HARRIS, *District Judge*, dissenting:

I respectfully dissent from the decision and opinion of the Court in this matter. In my view it is particularly important in matters of taxation that established precedent be followed, unless the Congress acts to change the rule as established or the rule be without substantial rational justification or foundation.

Were this a case of first impression I might well join with the majority. However, *Keinath* v. *C.I.R.*, 480 F.2d 57 (8th Cir. 1973), followed by the Eighth Circuit *en banc* in *Cottrell* v. *Commissioner*, __ F.2d __ (1980), has been the only precedent from a Court of Appeal since its decision in 1973. Numerous tax practitioners have undoubtedly relied on this opinion in advising as to the tax consequences of such acts as are involved in the instant case, and justifiably so.

The Congress, in the Tax Reform Act of 1976, acted to override the *Keinath* rule, but only prospectively. The effect of the decision of the majority is to give to the 1976 Amendments the retrospective effect which the Congress expressly rejected. An unnecessary split between holdings of the Circuit Courts of Appeal is thus established. I would follow the rule of *Keinath* and reverse.

70 T.C. No. 39

UNITED STATES TAX COURT

GEORGE F. JEWETT, JR., AND LUCILLE M. JEWETT,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

Docket No. 3877-76. Filed June 13, 1978.

T held a 50 percent remainder interest in a testamentary trust established under the will of his grandmother, who died in 1939. T reached the age of majority in 1948. In 1972, when the surviving life tenant of the trust was 72 years old, T executed disclaimers of portions of his remainder interest which were unequivocal and effective under Massachusetts law. *Held*, the disclaimers were not made within a reasonable time as required by section 25.2511-1(c), Gift Tax Regs. *Keinath v. Commissioner*, 58 T.C. 352, reversed 480 F.2d 57 (C.A. 8), followed.

Robert J. Richards, Jr., for the petitioners.

Willard J. Frank and *Charles W. Maurer, Jr.*, for the respondent.

OPINION

RAUM, *Judge:* The Commissioner determined the following deficiencies in petitioners' Federal gift tax:

Petitioner	Calendar Quarter Ending	Deficiency
George F. Jewett, Jr.	Sept. 30, 1972	$398,065.39
George F. Jewett, Jr.	Dec. 31, 1972	23,288.48
Lucille M. Jewett	Sept. 30, 1972	310,613.94
Lucille M. Jewett	Dec. 31, 1972	19,363.06

The only issue presented is whether George F. Jewett, Jr., made taxable gifts when he executed disclaimers of portions of his remainder interest in a certain testamentary trust.

Petitioners George F. Jewett, Jr., and Lucille M. Jewett, husband and wife, resided in Ross, California, at the time their petition in this action was filed. Petitioner George F. Jewett, Jr., filed his United States Gift Tax Returns for the calendar quarters ending September 30, 1972, and December 31, 1972, with the Internal Revenue Service Center in Fresno, California. Petitioner Lucille M. Jewett elected to consent to treat the gifts made by her husband during the taxable year 1972 as having been made by both husband and wife to the extent allowed by law and filed her United States Gift Tax Returns for the calendar quarters ending September 30, 1972, and December 31, 1972, with the Internal Revenue Service Center in Fresno, California. Since Petitioner Lucille M. Jewett is a party to this action solely by virtue of her consent to treat part of her husband's gifts as her own, George F. Jewett, Jr., will hereinafter be referred to as the petitioner.

Margaret Weyerhaeuser Jewett, petitioner's grandmother, died on January 14, 1939, a resident of Falmouth, Massachusetts. She left a will which was duly admitted to probate (Barnstable Probate No. 27161). Clause Eighth of said will created a trust (the "Trust") for the benefit of the testatrix's husband, James R. Jewett, during his lifetime and thereafter for the benefit of the testatrix's son, George F. Jewett, and George's wife, the testatrix's daughter-in-law, Mary Cooper Jewett (now Mary J. Gaiser), for their lives. The Trust, having been established under the Will of Margaret Weyerhaeuser Jewett, a Massachusetts decedent, has a *situs* in Massachusetts. The Trustee serving at the present time is John F. Cogan, Jr., of Lexington, Massachusetts.

Mary Cooper Jewett (now Mary J. Gaiser), petitioner's mother, is the sole surviving life tenant of the Trust, inasmuch as James R. Jewett and George F. Jewett are now deceased.

She was born on March 7, 1901, and is still living. Petitioner, her son, was born on April 10, 1927, and is now living.

Under the terms of Clause Eighth of the Will of Margaret Weyerhaeuser Jewett, petitioner was entitled to a share of the Trust remainder (the "Trust Remainder") if he survived his mother. If he did not survive his mother, the share to which he would have been entitled if he had survived was to pass to his issue per stirpes.

On August 30, 1972, petitioner executed an instrument entitled "Estate of Margaret Weyerhaeuser Jewett/George F. Jewett, Jr. Disclaimer". Said instrument was recorded in the Barnstable Probate Court on September 5, 1972. The instrument stated, in part:

> WHEREAS, MARGARET WEYERHAEUSER JEWETT, late of Falmouth, County of Barnstable, Commonwealth of Massachusetts, died on January 14, 1939, leaving a will which was proved and allowed by the Probate Court of said County on February 14, 1939, and
>
> WHEREAS, CLAUSE EIGHTH of said will created a trust for the benefit of her husband, JAMES R. JEWETT, during his lifetime and thereafter for the benefit of her daughter-in-law, MARY C. JEWETT (now MARY C. GAISER), and her son, GEORGE F. JEWETT (now deceased), and
>
> WHEREAS, discretionary payments of income are now being made to MARY C. GAISER pursuant to the provisions of Subparagraph 3 of Paragraph B of said CLAUSE EIGHTH by the Trustees of the aforesaid, and
>
> WHEREAS, the undersigned, as a son of MARY C. GAISER and the late GEORGE F. JEWETT, has an interest in fifty percent (50%) of the trust estate, including accumulations of income transferred to principal under the provisions of Paragraph B of CLAUSE NINTH provided that he survives said MARY C. GAISER, and

WHEREAS, the undersigned wishes to renounce his right to receive ninety-five percent (95%) of the aforesaid fifty percent (50%) of the remainder of the trust estate upon the death of MARY C. GAISER (but not including the right to receive fifty percent (50%) of the accumulations of income, if any there be, occurring after the execution of this disclaimer).

NOW, THEREFORE, the undersigned, said GEORGE F. JEWETT, JR., hereby irrevocably renounces and disclaims his right, if any, to ninety-five percent (95%) of the aforesaid fifty percent (50%) of the trust estate upon termination, provided, however, that this disclaimer shall not act upon any interest he may have in any accumulations of income which may occur after the date set forth below.

Petitioner had no interest in that portion of the Trust Remainder described in the instrument, from and after August 30, 1972.

On December 14, 1972, petitioner executed an instrument, in the same form as that executed August 30, 1972, by which he disclaimed his remaining 5 percent interest in one-half of the Trust Remainder. This second instrument was recorded in the Barnstable Probate Court on December 21, 1972. The parties have stipulated that petitioner had no interest in the Trust Remainder from and after December 14, 1972.

The value of the entire Trust corpus on August 30, 1972, was $7,912,393.63, and on December 14, 1972, was $8,398,038.37.

On their United States Gift Tax Returns for the calendar quarters ending September 30, 1972, and December 31, 1972, petitioners notified the Commissioner of the execution of the two disclaimers, but did not report as gifts any amount in respect of the Trust Remainder. The Commissioner determined that petitioner's execution of disclaimers of 95 and 5 percent,

respectively, of his 50 percent interest in the Trust Remainder constituted taxable gifts of those interests in the Trust Remainder, and determined deficiencies accordingly.

Section 2501, I.R.C. 1954, imposes a tax upon the transfer of property by gift, and the only question presented by this case is whether petitioner's execution of disclaimers of portions of his interest in the Trust Remainder constituted transfers of property by gift subject to the gift tax. See section 2511. The answer to this question is to be found in the proper interpretation of section 25.2511-1(c), Gift Tax Regs., which provides in pertinent part as follows:

Sec. 25.2511-1 Transfers in general.

* * * * * * *

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. * * * Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), *a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer.* The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the prop-

> erty, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. * * * [Emphasis supplied.]

The regulation sets up two criteria by which to judge whether a disclaimer shall be treated as a taxable transfer of property by gift rather than a mere refusal to accept ownership of a tendered gift or bequest: first, the disclaimer must be unequivocal and effective under local law, in this case the law of Massachusetts; and second, the disclaimer must be executed within a reasonable time after knowledge of the existence of the transfer. *Fuller v. Commissioner* 37 T.C. 147, 155; *Keinath v. Commissioner*, 58 T.C. 352, 358-359, reversed on another ground, 480 F.2d 57 (C.A. 8); *Estate of Hoenig v. Commissioner*, 66 T.C. 471, 477. The Commissioner does not dispute petitioner's claim that the two disclaimers executed by petitioner were unequivocal and effective under Massachusetts law. Therefore, the only issue is whether petitioner's disclaimers were executed within a reasonable time of his learning of the existence of the transfer to him. This is an issue of Federal law not controlled by State law concepts of "reasonable time". *Fuller v. Commissioner*, *supra*, 37 T.C. at 155; *Estate of Hoenig v. Commissioner*, *supra*, 66 T.C. at 477.

Petitioner executed the two disclaimers in 1972, approximately 33 years after the death of his grandmother and the establishment of the Trust, and 24 years after he himself reached the age of 21. The Commissioner argues that the "reasonable time" in which petitioner could disclaim his interest in the Trust Remainder without incurring gift tax liabil-

ity should be measured from the time he reached the age of majority (1948) since that date is later than the date of the creation of his interest in the Trust Remainder, namely, the date of Margaret Weyerhaeuser Jewett's death (1939).[1] Petitioner does not dispute that the interval, so measured, was not "reasonable". Petitioner argues, however, that the "reasonable time" does not begin to run until petitioner's interest becomes possessory upon the death of the last surviving life tenant, and relies on the fact that he disclaimed prior to the death of his mother, the surviving life tenant. The narrow issue presented, then, is whether, under Federal law, the petitioner had a "reasonable time" *from the death of the last surviving life tenant* in which he could disclaim his interest in the Trust Remainder without thereby making a taxable gift.

In *Keinath v. Commissioner, supra*, 58 T.C. 352, reversed 480 F.2d 57 (C.A. 8), the petitioner was the remainderman of a trust set up by the will of his late father. His interest was vested, subject to divestiture only if he should predecease the life beneficiary. Less than two months after the death of the life beneficiary, he executed a disclaimer of his interest which was timely and effective under local (Minnesota) law. We held that disclaimer a taxable gift under sections 2511 and 2501, noting (58 T.C. at 359-360):

> For nearly 19 years Cargill knew that if he survived his mother he would receive at least one-half of the corpus of the trust. He also knew, because he was a trustee of the trust, that receipt of the trust assets would be beneficial rather than onerous. Petitioners brought out no factor at trial which prevented Cargill from making a disclaimer of the remainder within a reasonable time after the creation of the trust. We can only assume that his reason for

[1] We assume that petitioner knew about his remainder interest in the Trust at least by the time he reached his majority. In any event, petitioners, upon whom the burden rested, did not establish otherwise.

waiting to disclaim until his mother's death was his inability to determine whether he would prefer receiving the assets himself or permit his children to get them at the termination of the trust.

As we have noted previously, section 2511 was intended to reach broadly to gifts of every type. The exception from taxation for disclaimers was designed to permit a donee to avoid receiving an unwanted gift or bequest within a reasonable time after learning of the gift or bequest; it should not be used as an estate-planning and tax-avoidance tool. On the facts in this case, we believe that Cargill was reasonably required by the regulation to disclaim his interest in the trust within a reasonable time after its creation.

We think that our decision in *Keinath* was correct and that it controls the decision in this case. Petitioner was a remainderman of the Trust whose interest would be defeated only if he failed to outlive his mother, the last surviving life tenant of the Trust.[2] His remainder interest was created when his grandmother died and the Trust was established pursuant to her will. See *Smith v. Shaughnessy*, 318 U.S. 176, 180-181; *Robinette v. Helvering*, 318 U.S. 184, 187; *Helvering v. Campbell*, 313 U.S. 15, 22. From the time of its creation, that remainder interest was a valuable property interest, even though it was subject to contingencies and had not, as yet, become possessory;[3] had he assigned his interest without con-

[2] We do not regard it as important whether petitioner's interest would be considered, under Massachusetts law, a contingent remainder or a vested remainder subject to divestiture, because the economic reality is the same. See *Helvering v. Hallock*, 309 U.S. 106, overruling *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39, and *Becker v. St. Louis Union Trust Co.*, 296 U.S. 48, where the formal difference between a contingent remainder and a vested remainder subject to divestment had been held to be crucial.

[3] The value of petitioner's remainder interest was not, of course, equal to 50 percent of the value of the Trust corpus. Rather, it depended upon actuarial factors reflecting the various contingen-

sideration, the transfer would have been subject to the gift tax. *Commissioner v. Procter*, 142 F.2d 824, 826-827 (C.A. 4), certiorari denied 323 U.S. 756. At least as early as 1948, when he reached the age of majority, petitioner could have disclaimed his remainder interest if he did not desire to accept its benefits, but he waited some 24 years before taking that step. During those 24 years he had the opportunity to assess whether disclaimer would be "the most advantageous course to be pursued", *Estate of Hoenig v. Commissioner*, *supra*, 66 T.C. at 477, and whether "he would prefer receiving the assets himself or permit his children to get them at the termination of the trust". *Keinath v. Commissioner*, *supra*, 58 T.C. at 359. For 24 years, in sum, he possessed the power to decide the ultimate disposition of his share of the corpus of the Trust, a power which he relinquished when he executed the two disclaimers. But it is precisely upon the relinquishment of the power to control the disposition of property that the gift tax is laid. *Burnet v. Guggenheim*, 288 U.S. 280, 287; *Sanford's Estate v. Commissioner*, 308 U.S. 39, 43; *Smith v. Shaughnessy*, *supra*, 318 U.S. at 181; *Robinette v. Helvering*, *supra*, 318 U.S. at 186-187. We hold, therefore, that the two disclaimers constituted taxable transfers of petitioner's remainder interest in the Trust.

Petitioner relies primarily upon the decision of the Court of Appeals for the Eighth Circuit in *Keinath v. Commissioner*, 480 F.2d 57, reversing our decision in *Keinath*, *supra*.[4] The Eighth Circuit agreed with our holding that the definition

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cies. There was originally a dispute between the parties as to the actuarial factors to be used, but the respondent has conceded that the petitioner's position in this regard is correct. Accordingly, there is no longer any controversy between the parties as to the computation of the value of the remainder interest.

[4] Petitioner also relies upon *Brown v. Routzahn*, 63 F.2d 914 (C.A. 6), certiorari denied, 290 U.S. 641. That case interpreted provisions of the Revenue Act of 1921, and did not purport to consider the effect of the regulations which control the disposition of this case.

of "reasonable time" is a matter of Federal law, but went on to say, 480 F.2d at 61-62:

> In determining "reasonable time" and the related issue of when the reasonable time period commences, we perforce, absent a federal statute or regulation defining reasonable time, must look to the law of the states. We are not conclusively bound by the state law, but this is the only field to probe for legal decisions and discussions on the phrase "reasonable time" as used in the context of making valid disclaimers. [Fn. ref. omitted.]

The Court then relied heavily upon Minnesota law in determining that the "reasonable time" should be measured from the date of death of the last surviving life tenant. But we do not agree that State law necessarily provides an adequate guide to the resolution of the Federal question presented by this case. The Federal gift tax is concerned with control over the disposition of property and with exercises of the right to determine who should enjoy the fruits of ownership of property. H. Rep. No. 708, 72d Cong., 1st Sess., 1939-1 C.B. (Part 2) 457, 476-477; S. Rep. No. 665, 72d Cong., 1st Sess., 1939-1 C.B. (Part 2) 496, 524-525; *Smith v. Shaughnessy, supra*, 318 U.S. at 180. State law, by contrast, may respond to concerns such as the balancing of conflicting claims to property, see, e.g., *McGivney v. McGivney*, 7 N.E. 721 (Sup. Jud. Ct., Mass.); *Garfield* v. *White*, 92 N.E.2d 575, 579 (Sup. Jud. Ct., Mass.); *Town of Pepperell v. Whipple*, 100 N.E.2d 844, 847 (Sup. Jud. Ct., Mass.), and the protection of the rights of creditors and other third parties, see, e.g., *Oliver v. Wells*, 173 N.E. 676, 679 (Ct. Apps. N.Y.), and *In re Wilson's Estate*, 83 N.E.2d 852, 854-855 (Ct. Apps. N.Y.); cf. *Estate of Dreyer v. Commissioner*, 68 T.C. 275, 292-294. While a State court might be willing to accept a renunciation of a non-possessory interest after the passage of considerable time, so long as the interests of third parties have not been harmed, the passage of time is crucial to the scheme of the gift tax. With time, the potential recipient can wait to see if he himself needs the prop-

erty, or whether he had better let it pass directly to the next generation.

The petitioner further argues, however, that this Court has acquiesced in the reversal of *Keinath*. In *Estate of Rolin v. Commissioner*, 68 T.C. 919, 927, on appeal (C.A. 2), it was stated:

> Moreover, under New York law, the reasonable time for renunciation would not begin to run until the interest is indefeasibly fixed both in quality and quantity. [Citation]. The same rule has been recognized for Federal tax purposes. *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973). Such a rule should be applied here.

In *Rolin*, however, a case that was not reviewed by the full Court, the question was whether the "reasonable time" for renunciation began to run upon the creation of a revocable inter vivos trust or at the death of the trust donor. It was held that the revocability of the trust meant that the donee's interest was not fixed until the power of revocation lapsed upon the death of the donor. Here, however, petitioner's interest became fixed upon the death of Margaret Weyerhaeuser Jewett, and remained fixed — if contingent — at all times thereafter. *Rolin* did not, therefore, address the issue presented by this case.

The petitioner attempts, finally, to distinguish this case from *Keinath*, but we find the proposed distinctions unconvincing. In *Keinath*, it is argued, the remainder interest was vested in the beneficiary seeking to disclaim it, while this petitioner held only a contingent remainder interest. Accepting the latter allegation as true, however, see note 2, *supra*, we do not regard it as controlling. The substance of the property transaction, not its form under archaic principles of property law, must control. *Helvering v. Hallock*, 309 U.S. 106, 116-118. Furthermore, it is argued, the disclaimer in *Keinath* was not complete and unequivocal because the disclaiming beneficiary acted "with the understanding" that the dis-

claimed property would pass in a certain manner. Brief for the Petitioner, at 14. It is true that the petitioner in *Keinath* sought a ruling from the Minnesota courts as to the disposition of the disclaimed remainder interest under State law. *Keinath* v. *Commissioner*, *supra*, 58 T.C. at 355. But he nonetheless made a valid and unequivocal disclaimer of his remainder interest, and the Minnesota court so held. *Keinath* v. *Commissioner*, *supra*, 58 T.C. at 356. And in any event, we think it irrelevant that petitioner herein, unlike the petitioner in *Keinath*, was willing to act upon his own understanding of the law which would apply to the disposition of his remainder interest following his disclaimer.

The petitioner possessed, for 24 years, the effective right to determine who should ultimately receive the benefits of a 50 percent remainder interest of a trust which, in 1972, had a corpus of approximately $8 million. He waited to act in respect of that remainder interest until the surviving life beneficiary was over 70 years of age and until he himself was 45 and, it appears, a man of substantial means.[5] In 1972, by the execution of two disclaimers, he elected to let the property pass according to the alternative provisions of his grandmother's will — to the natural objects of his bounty. This, we hold, was an exercise of control over the disposition of property subject to the gift tax imposed by section 2501.

Finally, we note that section 2009(b) of the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1893, added a new section 2518 to the gift tax provisions of the Code. Section 2518 lays out specific standards for determining when a disclaimer constitutes a taxable gift, and would support the Commissioner's position here if the disclaimers had been executed after its effective date. Moreover, the legislative history strongly indicates that Congress disapproved of the result reached by the Eighth Circuit in *Keinath* insofar as it permitted a tax-free

[5] Petitioner's gift tax returns disclose that he made taxable gifts of $2,751,502 between 1958 and 1972, not including the interests in the Trust here at issue.

disclaimer to be made 19 years after the creation of a remainder interest in a testamentary trust. See H. Rep. No. 94-1380, 94th Cong., 2d Sess. 66, 1976-3 C.B. (Volume 3) 800. We think that section 2518 was intended to make sure that no such result would thereafter be reached and that it was certainly not intended to approve a contrary interpretation of the statute as it existed prior to the amendment. Cf. *Knetsch v. United States*, 364 U.S. 361, 367-369.

To reflect the Commissioner's concession in respect of valuation of the remainder interest,

Decision will be entered under Rule 155.

Reviewed by the Court.

UNITED STATES TAX COURT

Docket No. 3877-76

GEORGE F. JEWETT, JR. and
LUCILLE M. JEWETT,
PETITIONERS,
v.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

STIPULATION OF FACTS

The parties hereby stipulate and agree that for the purpose of this case the following facts and exhibits attached hereto and made a part hereof may be taken as true, subject to the rights of the parties to introduce other and further evidence not inconsistent with this stipulation and preserving the parties' rights to object, at the time of trial, to any and all portions of said stipulation and attached exhibits as they may deem to be irrelevant or immaterial:

1. George F. Jewett, Jr. and Lucille M. Jewett, the petitioners herein, are husband and wife and resided at Skyland Way, Ross, California 94957.

2. Petitioner George F. Jewett, Jr. filed his United States Gift Tax Returns for the calendar quarters ending September 30, 1972 and December 31, 1972, with the Internal Revenue Service Center in Fresno, California. Attached hereto and made a part hereof are the originals of said returns marked Exhibits 1-A and 2-B, respectively.

3. Petitioner Lucille M. Jewett elected to consent to treat the gifts made by petitioner George F. Jewett, Jr. during the taxable year 1972 as having been made by both husband and wife to the extent allowed by law and filed her United States Gift Tax Returns for the calendar quarters ending September 30, 1972 and December 31, 1972, with the Internal Revenue Service Center in Fresno, California. Attached hereto and

made a part hereof are copies of said returns marked as Exhibits 3-C and 4-D, respectively.

4. Margaret Weyerhaeuser Jewett, late of Falmouth, Massachusetts, died on January 14, 1939, leaving a will which was duly admitted to probate (Barnstable Probate No. 27161). Attached hereto and made a part herof is a copy of said will marked Exhibit 5-E.

5. Clause Eighth of said will (Exhibit 5-E) created a trust for the benefit of the testatrix's husband, James R. Jewett, during his lifetime and thereafter for the benefit of the testatrix's son, George F. Jewett, and his wife, the testatrix's daughter-in-law, Mary Cooper Jewett (now Mary J. Gaiser).

6. The trust, having been established under the Will of Margaret Weyerhaeuser Jewett, a Massachusetts decedent, has a *situs* in Massachusetts. The presently serving Trustee is John F. Cogan, Jr. of Lexington, Massachusetts.

7. James R. Jewett and George F. Jewett are now deceased. Mary Cooper Jewett (now Mary J. Gaiser) was born on March 7, 1901 and is now living.

8. Petitioner George F. Jewett, Jr., a child of the testatrix's son George F. Jewett and the said Mary Cooper Jewett (now Mary J. Gaiser) was born on April 10, 1927 and is now living.

9. Under the terms of Clause Eighth of the Will of Margaret Weyerhaeuser Jewett (Exhibit 5-E), if petitioner George F. Jewett, Jr. survived his mother, Mary Cooper Jewett (now Mary J. Gaiser), he would become entitled to a share of the trust remainder. If he did not survive his mother, Mary Cooper Jewett (now Mary J. Gaiser), he would not become so entitled.

10. On August 30, 1972 petitioner George F. Jewett, Jr. executed an instrument entitled:

Estate of Margaret Weyerhaeuser Jewett
George F. Jewett, Jr. Disclaimer

Said instrument was recorded in the Barnstable Probate Court on September 5, 1972. Petitioner George F. Jewett had no interest in that portion of the trust remainder described in said

instrument, from and after August 30, 1972. Attached hereto and made a part hereof is a copy of said instrument marked Exhibit 6-F.

11. On December 14, 1972 petitioner George F. Jewett, Jr. executed an instrument entitled:

Estate of Margaret Weyerhaeuser Jewett
George F. Jewett, Jr. Disclaimer #2

Said instrument was recorded in the Barnstable Probate Court on December 21, 1972. Petitioner George F. Jewett, Jr. had no interest in the trust remainder from and after December 14, 1972. Attached hereto and made a part hereof is a copy of said instrument marked Exhibit 7-G.

12. The value of the entire trust corpus on August 30, 1972 was $7,912,393.63.

13. The value of the entire trust corpus on December 14, 1972 was $8,398,038.37.

14. The actuarial factor employed by respondent in his notice of deficiency for the asserted August 30, 1972 gift was based on Table LN with interest at 6 percent and was 0.50533.

15. The actuarial factor employed by respondent in his notice of deficiency for the asserted December 14, 1972 gift was based on Table LN with interest at 6 percent and was 0.50079.

(s) ROBERT J. RICHARDS, JR. Date: Oct. 21, 1977
ROBERT J. RICHARDS, JR.
Counsel for Petitioners
HALE AND DORR
28 State Street
Boston, MA 02109

STUART E. SEIGEL
Chief Counsel

By: _____ Date: _____
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Boston, MA 02110
Tel. No. 617-223-7066

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 3877-76

GEORGE F. JEWETT, JR. and
LUCILLE M. JEWETT,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ORDER

The Court filed its opinion in this case on June 13, 1978. On July 14, 1978, the Court received from the petitioners a "Motion for Reconsideration of Findings and Opinion" under Rule 161, Tax Court Rules of Practice and Procedure. The opinion and findings have been reconsidered in light of petitioners' motion and their memorandum of law in support thereof, and no basis has been found to change the result reached therein.

It is noted, among other things, that petitioners complain that the opinion is violative of *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, and that they make a related contention that the opinion fails to consider the argument in their brief in respect of the Federal estate tax laws. These matters, however, were considered, and it was concluded that the gift tax clearly applies to the gratuitous transfer of valuable property rights notwithstanding the fact that such rights, like a simple life estate, might under certain circumstances terminate on or before the death of the donor and therefore escape inclusion in the gross estate. Petitioners' argument in this respect was found so lacking in merit in light of the Supreme Court's later opinion in *Smith* v. *Shaughnessy*, 318 U.S. 176, 178-181, that it warranted no discussion. See also *Commissioner* v. *Procter*, 142 F. 2d 824, 826-827 (C.A. 4).

In order to clarify the Court's opinion in other respects it is hereby

ORDERED:

1. In the first full sentence on page 10, the word "possessory" is deleted and replaced by the phrase "indefeasibly vested".

2. In the sentence beginning on page 14 and continuing onto page 15, the phrase "non-possessory interest" is deleted and replaced by the phrase "non-possessory and not-indefeasibly-vested property interest."

3. On page 15, the last two sentences are deleted and the following is inserted in their place:

> Here, however, petitioner's interest became fixed, in the sense in which that word was used in *Rolin*, upon the death of Margaret Weyerhaeuser Jewett. At that point, the testatrix's power of revocation ceased and petitioner's interest under her will was no longer subject to her unfettered discretion. See *Sanford's Estate* v. *Commissioner*, *supra*, 308 U.S. at 43-44. Moreover, petitioner's interest was, at the death of Margaret Weyerhaeuser Jewett, "fixed both in quality and quantity" as required by *Rolin*. His interest was a remainder interest (quality) in 50 percent of the corpus of a trust (quantity), which interest would become indefeasibly vested, and possessory, only if he survived the last surviving life tenant. We regard it as irrelevant under *Rolin* that, as with any remainder interest, the present dollar value of petitioner's interest, being dependent upon actuarial factors, would fluctuate over time.

4. The sentence beginning on page 17 and continuing onto page 18 is amended to read as follows:

> The new provisions, which were made prospective only (see section 2009(e)(2) of the 1976 Act), lay out specific standards for determining when a disclaimer constitutes a taxable gift, and would support the Commissioner's position here if the disclaimers here were subject to its provisions.

5. The Court's opinion remains in all other respects unchanged.

(s) ARNOLD RAUM
ARNOLD RAUM, Judge

Dated: Washington, D.C.
July 19, 1978

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 3877-76

GEORGE F. JEWETT, JR. and
LUCILLE M. JEWETT,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ORDER

On July 14, 1978, petitioners filed a Motion for Reconsideration of Findings and Opinion. The opinion referred to in the motion was reviewed by the Tax Court and adopted pursuant to section 7460(b), I.R.C. of 1954. Insofar as petitioners' motion may be interpreted as a motion for reconsideration by the Court pursuant to that section, it is

ORDERED that the motion is denied.

(s) C. MOXLEY FEATHERSTON
C. MOXLEY FEATHERSTON
Chief Judge

Dated: Washington, D.C.
July 19, 1978

UNITED STATES TAX COURT

Docket No. 3877-76

GEORGE F. JEWETT, JR. and
LUCILLE M. JEWETT,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

DECISION

Pursuant to the opinion of the Court filed June 13, 1978, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there are deficiencies in gift taxes due from the petitioner, George F. Jewett, Jr., for the calendar quarters ended September 30, 1972 and December 31, 1972, in the amounts of $381,729.84 and $23,288.48, respectively; and

That there are deficiencies in gift taxes due from the petitioner, Lucille M. Jewett, for the calendar quarters ended September 30, 1972 and December 31, 1972, in the amounts of $297,047.13 and $19,363.06, respectively.

(Signed) ARNOLD RAUM
Judge

Entered Aug 17 1978

* * * * *

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

(s) ROBERT J. RICHARDS, JR. Date: August 4, 1978
ROBERT J. RICHARDS, JR.
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HALE AND DORR
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STUART E. SEIGEL
Chief Counsel
Internal Revenue Service

By: (Sgd) ROBERT B. DUGAN Date: Aug 11 1978
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Tel. No. (617)-223-7066

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-3621

GEORGE F. JEWETT, JR., AND
LUCILLE M. JEWETT,
PETITIONERS-APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE.

Before:
BROWNING and MERRILL, *Circuit Judges*,
and HARRIS,* *District Judge*

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Browning has voted to reject the suggestion for a rehearing and Judges Merrill and Harris have recommended such rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The motion of Theodore W. Hirsh and Donald R. Mering to file brief as amicus curiae, etc., is hereby denied. The motion of Wallace B. Liverance, Jr., and Geoffrey J. O'Connor for leave to file brief as amicus curiae is hereby denied. The motion of Adelaide C. Griswold, James R. Houghton, Amory Houghton, Jr., and Eleanor C. Hallenbeck for leave to file brief as amici curiae is hereby denied.

---

* Honorable Oren Harris, Senior United States District Judge of the District of Arkansas, sitting by designation.

Treasury Regulation §25.2511-1 *Transfers in general:*

* * *

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further §25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refual is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of onwership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was devised to A under the decedent's will (which also provided that all lapsed legacies and devices shall go to B, the residuary beneficiary), and under local law A could refuse

to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. However, if a decedent who owned Greenacre died intestate with C and D as his only heirs, and under local law the heir of an intestate cannot, by refusal to accept, prevent himself from becoming an owner of intestate property, any gratuitous disposition by C (by whatever term it is known) whereby he gives up his ownership of a portion of Greenacre and D acquires the whole thereof constitutes the making of a gift by C to D.

Footnote 1: State Disclaimer Statutes:

Alaska: Alaska Stats. §§13.06.005 to 13.36.100.
Arizona: Ariz. Rev. Stats. §§14-1101 to 14-7307.
Arkansas: Ark. Stats. §62-3202(b).
California: West's Ann. Civ. Code §190.3(a).
Colorado: Col. Rev. Stats. 1973 §§15-10-101 to 15-17-101.
Florida: West's F.S.A. §§731.005 to 735.302.
Georgia: Ga. Code Ann. §113-824(b).
Hawaii: Laws 1976, No. 200.
Idaho: Ida. Code §§15-1-100 to 15-7-307.
Illinois: S.H.A. c. 110 ½ §2-7.
Indiana: Ind. Code §29-1-6-4(b).
Iowa: Iowa Code §633.704(2)(a).
Kansas: Kans. Stats. Ann. §59-2292.
Kentucky: Ken. Rev. Stats. Ann. §394.620(2).
Maine: 18 Maine Rev. Stats. Ann. §1273(2); 18A Maine Rev. Stats. Ann. §2-801.
Massachusetts: Mass. Gen. Laws c. 191A, §3.
Minnesota: Minn. Stats. Ann. §§524.1-100 to 524.8-103.
Montana: Rev. Code Mont. 1947 §§91A-1-101 to 91A-6-104.
Nebraska: R.R.S. 1943 §§30-2201 to 30-2902.
New Mexico: 1953 Comp. §§32A-1-101 to 32A-7-401.
North Carolina: N.C. Gen. Stats. §31B-2(b).
North Dakota: No. Dak. Div. Code §§30.1-01-01 to 30.1-35-01.
Oregon: Oreg. Rev. Stats. §§14-1101 to 14-7307.
Texas: Tex. Probate Code §37A(a).
Utah: Utah Code Ann. 1953 §§75-1-101 to 75-8-101.
Virginia: Va. Code §64.1-189.
Washington: Rev. Code Wash. Ann. §11.86.030.

Office-Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1614

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE F. JEWETT, JR.
and
LUCILLE M. JEWETT,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

JAMES D. ST. CLAIR
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TIMOTHY H. GAILEY
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Counsel for Respondent

PETITION FOR CERTIORARI FILED MARCH 25, 1981.
CERTIORARI GRANTED JUNE 1, 1981.

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The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the indicated pages in the appendix to the printed Petition for Certiorari:

Stipulation of Facts, dated October 21, 1977.....	A-20
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Order of the United States Tax Court denying Motion for Reconsideration, dated July 19, 1978.....	A-26
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UNITED STATES TAX COURT
GENERAL DOCKET

Docket No. 3877 76

GEORGE F. JEWETT, JR. AND LUCILLE M. JEWETT
Skyland Way, Ross, California 94957
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

Appearances for Petitioner:
Robert J. Richards, Jr. (Hale & Dorr), 60 State St., Boston, MA 02109

DOCKET ENTRIES

1976

May 5 PETITION FILED: FEE PAID May 5, 1976
May 5 REQUEST by Petr. for trial at Boston, MA filed. Granted May 5, 1976
June 28 ANSWER by Resp. filed. (C/S 6/24/76)

1977

July 18 NOTICE OF TRIAL on Oct. 25, 1977 at Boston, MA
Oct. 14 NOTICE CHANGING COURTROOM AND ADDRESS FOR TRIAL SESSION.
OCT. 25 TRIAL at Boston, MA before Judge Featherston.
Stipulation of Facts with exhibits.
ORIGINAL BRIEFS DUE: Dec. 9, 1977
REPLY BRIEFS DUE: Jan. 9, 1978
SUBMITTED TO JUDGE FEATHERSTON
Nov. 14 TRANSCRIPT of Oct. 25, 1977 received.
Dec. 9 BRIEF filed by resp.
Dec. 12 BRIEF filed by petr. (PM Timely)
Dec. 14 ORDER that this case is reassigned to Judge Raum.

1978

Jan. 9 REPLY BRIEF filed by petr.

Jan. 11 REPLY BRIEF filed by Resp.

June 13 OPINION filed Judge Raum.
(Decision will be entered under Rule 155.)

July 14 MOTION by Petr. for Reconsideration of Findings and Opinion. See Order July 19, 1978

July 14 MEMORANDUM OF LAW in Support of Petr's. motion for Reconsideration of Opinion filed.

July 19 ORDER, that the Opinion filed on June 13, 1978 is Amended in part and in all other respects it remains unchanged.

July 19 ORDER, that Petr's. motion filed Jul 14, 1978 as moves for reconsideration of Opinion by the Court is denied.

Aug. 16 AGREED COMPUTATION filed.

Aug. 17 DECISION ENTERED, Judge Raum.

APPELLATE PROCEEDINGS

Oct. 17 MOTION to fix amount of bond filed by Petitioners.

Oct. 17 ORDER fixing the amount of bond at $1,139,217.28.

Nov. 13 Surety bond in the amount of $1,139,217.28, with St. Paul Fire & Marine Insurance Company, as surety, approved and ordered filed.

Nov. 13 NOTICE OF APPEAL to U.S.C.A., Ninth Circuit, filed by Petitioners.

Nov. 14 NOTICE of Filing with copy of notice of appeal sent Mr. Stuart E. Seigel, Chief Counsel.

Nov. 14 NOTICE, to parties, of assembling and date for transmission of the record.

Nov. 22 MOTION to withdraw original exhibits 1-A thru 4-D and substitute photostatic copies therefor. Granted Nov. 27, 1978

78-3621

United States Court of Appeals
For the Ninth Circuit

No. 3877-76
Notice of Appeal filed Nov. 13, 1978

GEORGE F. JEWETT, JR. AND LUCILLE M. JEWETT,
PETITIONERS/APPELLANTS,
v.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT/APPELLEE.

For Appellant:
Christopher T. Carlson, Esq.
Robert J. Richards, Jr., Esq.
Hale & Dorr
For Appellee:
Stuart E. Seigel, Chief Counsel
M. Carr Ferguson, Asst. Attorney General

CIVIL TAX
From Tax Court, Northern, Calif.

• • • •

DOCKET ENTRIES

1978
Dec. 12 DOCKET FEE PAID. nw
Dec. 13 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. nw
Dec. 19 FILED CERT. ADMIN. RECORD ON APPEAL IN ONE VOLUME OF PLDGS, VOL. I. ORIG. ONLY. ONE ENVELOPE OF EXHIBITS IN LPS. -pb-
Dec. 19 APLTS' OPENING BRIEF DUE 1/29/79. -pb-

1979

Jan. 8 FILED TWO ADDL. COPIES VOL. I. PLDGS. -pb- $15.00 clerk's fee

Jan. 8 Sent one copy each of vol. I, Pldgs to counsel for Aplts' (Carlson) & Aple (Ferguson) -pb-

Jan. 26 Filed 25 aplt's opening briefs (1/25/79). ogm

Mar. 1 Filed motion & order (clerk) granting Aple an ext. of time to March 14, 1979 to file its brief. -db-

Mar. 19 Filed orig. & 24 aple's briefs (3/14). ogm

April 4 Filed as of 4/2, 25 aplt's reply briefs (3/30). ogm

1980

Nov. 4 Filed Aplt's Additional Citations. (11/30) -vts- (panel)

Nov. 12 ARGUED & SUBMITTED TO BROWNING, MERRILL, CJJ, O. HARRIS, DJ (W.ARK.) Add'l Cites to Records

Dec. 9 ORDERED OPINION FILED (MERRILL) & JUDG TO BE FILED & ENTD. Calendered San Fran Nov. 12, 1980

Dec. 9 Filed Opinion—AFFIRMED. (HARRIS DISSENTING)

Dec. 9 Filed & Entd Judgement. -dmf-

Dec. 23 Filed, as of Dec. 22, aplee's Bill of Costs. 12/17 -dmf-

Dec. 23 Filed, as of Dec. 22, aplts' petition for rehearing and suggestion for rehearing en banc. (active judges) -dmf-

Dec. 23 Filed, as of Dec. 22, motion (Liverance and O'Connor) for leave to file brief amicus curiae re petition for rehearing. (panel) 12/19 -dmf-

Dec. 23 Filed, as of Dec. 22, motion (Griswold, et al) for leave to file brief amicus curiae re petition for rehearing. (panel) 12/19 -dmf-

Dec. 30 Filed, as of Dec. 23, motion (Hirsh and Mering) for leave to file brief as amicus curiae and for enlargement of time for filing same. (panel) 12/22 -dmf-

1981

Feb. 18 Filed order (Browning, Merrill, Harris) The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. The motions for leave to file briefs amici curiae are hereby denied. -dmf-

Feb. 26 Filed aplts' motion for stay of mandate pending application for certiorari. (Merrill) 2/24 -dmf-

Mar. 3 Filed Order (Merrill) motion for stay of mandate granted to March 27, 1981. -dmf-

Received SC notice of filing petition for cert on 3/25/81, SC#80-1614. pn

Filed certified copy of SC order of 6/1/81, granting cert. (copies to panel) pn

Exhibit 5-E to Stipulation of Facts entered October 25, 1977:

I, MAGARGARET WEYERHAEUSER JEWETT of Woods Hole, Barnstable County, Massachusetts, make this my last will and testament, revoking all previous wills and codicils made by me.

Clause First: I constitute and appoint my husband, JAMES R. JEWETT, and my son, GEORGE F. JEWETT, or the survivor of them, to be the executors or executor of this my will. If neither my said husband nor my said son becomes executor, or if both cease to be executors, I constitute and appoint my nephew, EDWIN W. DAVIS of Cloquet, Minnesota, to be the executor. If he does not become or ceases to be an executor, I constitute and appoint my nephew, FREDERICK K. WEYERHAEUSER of St. Paul, Minnesota, to be the executor. If he does not become or ceases to be executor, I constitute and appoint my nephew, FREDERICK WEYERHAEUSER of said St. Paul, to be the executor.

If at any time in the opinion of my executors or executor such an appointment would be desirable, I constitute and appoint as an additional executor of this will such person resident in Massachusetts as shall be nominated by the said executors or executor by a writing filed in the court in which my will is proved.

Clause Second: I constitute and appoint my said husband and my son, GEORGE F. JEWETT, and the survivor of them to be the trustees or trustee under this my will. In case both of them do not become or cease to be trustees, I constitute and appoint my daughter-in-law, MARY COOPER JEWETT, wife of my said son, to be trustee.

If at any time in the opinion of my trustee or trustees it is desirable to have an additional trustee, he or they shall nominate another trustee who shall be a resident of Massachusetts. Such nomination shall be presented to the Probate Court having jurisdiction over the trust estate to the end that such Court shall appoint the person nominated to be trustee, and upon such appointment the trust estate shall vest in the old and new trustees without further conveyance or formality.

Clause Third: I exempt each executor and each trustee and successor trustee from giving any bond or any surety on any bond, and expressly request, direct, and provide that they and each of them be so exempt.

Clause Fourth: No corporation, transfer agent, or other person dealing with any executor or trustee shall be obliged to see to the application of any money or property delivered to any executor or trustee, or to examine into the trusts upon which any property administered under my will is held, but any such corporation, transfer agent, or other person may deal with any such property and with any executors or executor or trustees or trustee as if such executor or trustee were the owner thereof free of any trust.

Clause Fifth: I direct my executors to set aside a fund consisting of all the shares of Texas Corporation which I own at the time of my death and that this stock or the proceeds thereof shall be used to pay all Massachusetts legacy, inheritance, and estate taxes.

Clause Sixth: I give and bequeath to my said husband and my said son as jointenants, and to the survivor, free of all estate, legacy, inheritance, and succession taxes, all my furniture, silver, pictures, books, clothing, papers, automobiles, and all articles of personal or household use or ornament whatsoever, hoping but not requiring that they will make such disposition of them as they think I would have wished.

Clause Seventh: I give to THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE, incorporated under the laws of Massachusetts, the sum of One Hundred and Fifty Thousand Dollars ($150,000) free of all estate and inheritance taxes. This amount shall be set aside as an endowment fund and the income thereof used for the support of a professorship of Arabic in Harvard University to be known as "The James Richard Jewett Professorship of Arabic". I also give to THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE a further sum of Ten

Thousand Dollars ($10,000) free of all estate and inheritance taxes. This fund shall be known as "The Jewett Fund" and shall be held by said President and Fellows or their successors and the income thereof accumulated. Whenever the accumulations of income thereon shall amount to Ten Thousand Dollars ($10,000) such accumulations shall be added to and merged with the professorship endowment fund. The original fund of Ten Thousand Dollars ($10,000) shall continue to be held upon the trust to accumulate the income and to add the accumulations to the professorship endowment fund upon each occasion when such accumulations amount to Ten Thousand Dollars ($10,000) until the value of the said endowment fund shall amount to Two Hundred Thousand Dollars ($200,000). Then, if in the opinion of the said President and Fellows the income of the endowment fund is as great or greater than an amount equal to the average salary of full professors at Harvard University, the accumulation under the above provisions shall be suspended. Such accumulation shall, however, be resumed at any time, or from time to time, if in the opinion of said President and Fellows the income of the endowment fund falls below or may be expected to fall below the above average figure for professors' salaries. While such suspension of the provisions for accumulation of the income of this fund for the endowment fund continues, four-fifths of the income of the fund and of any accumulations of income thereon may be applied to the general purposes of Harvard University and the remainder of such income shall be accumulated and added to the principal of the fund.

So far as possible either my husband or I intend to complete the gift set out in this clause during our lifetimes. Accordingly, the value of any gifts at the time of such gift made by me or my husband before my death to THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE for purposes identical with or similar to the provisions of this will shall be deducted from the amount of this legacy and shall first be deducted from the portion thereof which consists of One Hundred and Fifty Thousand Dollars ($150,000).

Clause Eighth: All the rest and residue of my estate, real and personal, in which is to be included any over which I now or hereafter have power of appointment, I give, devise, bequeath, and appoint to my said husband and my said son as trustees in fee simple upon the following trusts:

A. During the life of my said husband the trustees shall pay to him quarterly, or more often in the discretion of the trustees, the net income of the trust fund.

B. Upon the death of my said husband or upon my death if he dies before me, the trustees shall divide the fund into two equal shares and shall hold said shares on separate trusts as follows:

1. During the life of my said son, the trustees shall pay to him quarterly, or more often in the discretion of the trustees, the net income of the first share.

2. On the death of my said son the trustees shall add the remaining principal and all unpaid and accrued income of the first share to the second share if said MARY COOPER JEWETT is then living.

3. During the life of said MARY COOPER JEWETT the trustees shall pay to her quarterly, or more often in the discretion of the trustees, the net income of the second share.

4. On the death of said MARY COOPER JEWETT the trustees shall add the remaining principal and all unpaid and accrued income of the second share to the first share if my said son is then living.

5. Upon the death of the survivor of my said daughter-in-law and my said son the trustees shall hold, manage and dispose of the fund, which will then consist of the combined first and second shares, as follows:

(a) They shall divide the fund into equal shares or trusts so that there shall be one share for each child of my said son then living and one share for the issue then living representing each child of my said son then dead;

(b) They shall pay each share set apart for the issue of a deceased child to such issue per stirpes;

(c) They shall pay each share set apart for a child who has reached the age of twenty-five (25) years to such child;

(d) They shall pay the net income of each share set apart for a child who is then under the age of twenty-five (25) years to such child during the term of the trust of his share. When he reaches the age of twenty-one (21) years, they shall distribute to him one-fourth of the principal of his share and all unpaid, accrued, and accumulated income thereon, and when he reaches the age of twenty-five (25) years, they shall distribute to him all of the remaining principal of his share and all unpaid, accrued, and accumulated income thereon;

(e) If any child of my said son lives to become entitled to income but dies before becoming entitled to all of the principal of his share, the trustees shall pay the principal and all unpaid, accrued, and accumulated income of such child's share to his issue living at his death per stirpes; and if no such issue is living, shall divide such share equally among his living brothers and sisters and the then living issue of deceased brothers and sisters, such issue to take the share to which their ancestor would be entitled per stirpes. The distributive share of each child for whom there is a trust fund existing under this will shall be added to the principal of such fund.

6. If at the death of my said husband, my said daughter-in-law, my said son, and myself there is no issue of my said son living, the trustees shall pay the trust fund, or the executors shall distribute the residue, as the case may be, to my nephew, EDWIN C. DAVIS of Cloquet,

Minnesota, or in case he is not living, to his issue per stirpes; and if neither he nor any of his issue is then living, to those persons who would under the statute of distributions now in force in Massachusetts be my next-of-kin if I died immediately after the survivor of my said husband, my said daughter-in-law, and my said son, or in case I survive my said husband, my said daughter-in-law, and my said son, to my next-of-kin at my death.

7. If any child of my said son lives to become entitled to the income of the share held in trust but dies before becoming entitled to principal and there are no issue of my said son living at his death, the trustees shall pay and distribute such child's share to my said nephew and if he is not living at such time, to his issue then living per stirpes; and if either he nor his issue is then living, to those persons who would under the statute of distributions now in force in Massachusetts be my next-of-kin if I died immediately after the death of such child.

8. At the expiration of twenty-one (21) years after the death of the last survivor of my said husband, my said daughter-in-law, my said son, my said son's children living at my death, and myself, the principal of which any life tenant hereunder is then entitled to receive the income shall vest in him notwithstanding provisions elsewhere in this will for its vesting at a later date and be paid over to him forthwith.

Clause Ninth: The beneficial interests are also subject to the following provisions:

A. So far as the trustee is directed to pay income or principal to any beneficiary he may make such payments directly to such beneficiary whether or not under age, may make such payments to the beneficiary's guardian or conservator, or may expend the same for his use or benefit, and he shall have power to determine what expenditures are for the use and benefit of any beneficiary.

B. So far as the trustee is directed to pay income of any share to any beneficiary, he may in his discretion accumulate said income or any part or parts thereof and retain the accumulations on a separate account, with discretionary power to pay them out at a later time or later times as if they were part of current income or to transfer them from time to time to principal.

C. All provisions in this instrument for the payment of any sum, whether principal or income, are subject to the further provision and condition that said principal or income shall be inalienable and not subject to be reached or applied by any creditor of the person entitled thereto.

Clause Tenth: I give to the executors and trustees hereunder and their successors the following powers, rights, and exemptions in addition to and not in limitation of any given otherwise in this instrument or by rules of law and make the following provisions concerning them:

A. They shall have full power to sell at public auction or private sale on such terms as they shall think proper any of my property and any property which passes by this will and any property which they may hold at any time, whether real or personal, and to invest and reinvest the proceeds at their discretion in such investments as they may deem advisable.

B. They may borrow money, sign mortgages and notes and bonds binding my estate, mortgage real estate and pledge personal property. They may lend money to any concern in which they, as such executors or trustees, hold securities, and purchase or subscribe to new securities of any kind or concern whatsoever. They may do any act which in their opinion makes any investment held by them more valuable or secure.

C. They shall have the power to hold some or all of the shares or portions of the trust fund together as a unit, or to hold any share or portion separately for the beneficiaries thereof.

D. They may carry the trust fund or any part or share or fractional share thereof in their individual names or in the name of any person or persons, natural or artificial.

E. I desire their best and prudent judgment and action, but I do not wish that they should be limited to the investments allowed by law from time to time, or otherwise limited in their actions, and I expressly provide that neither their choice of investments nor their powers of action in any matter shall be limited in any manner whatsoever so long as they exercise their own judgment and act in good faith.

F. They shall have power to compromise without leave of court any and all claims of any kind which they deem it expedient to compromise in the course of performing their duties hereunder.

G. Their determination made in good faith as to whether any sum or thing is income or principal in apportioning anything between income and capital or between persons successively entitled to the income of a trust in their hands shall be final and binding.

H. In making any division or disposition of my property as herein or in any codicil provided for, my executors or trustees may either convert the property, real and personal, into money or distribute it or any part of it in kind at such valuations as they think fair and equitable, and in the event of a partial division or disposition of the property, real and personal, may adjust any balance or balances in cash. They may appoint in writing to any or every legatee or beneficiary named in this will such portion or portions of my estate as they in their discretion

think best and as shall in their opinion equal the amount to which said legatee or beneficiary is entitled. The exercise of such power in favor of any legatee or beneficiary shall be a satisfaction of his or her legacy, and this power shall extend to both my real and personal estate.

I. They shall not be personally liable for their action or non-action except for bad faith.

J. Whenever in this will or any codicil I give powers, authority, discretion, protection, or exemption from sureties to, or make provisions concerning, my executor or any trustee hereunder, I hereby extend all such gifts and provisions to any other person holding either office, whether named or not, and to any administrator, or successor trustee.

Clause Eleventh: My executors or trustees may at any time in their discretion pay or satisfy out of the principal of the residue or out of the principal of any trust fund on any terms that seem reasonable to them any of such taxes or duties on any future interest or on any interest which the law may permit to be paid or satisfied at that time although this amount be not then due and payable and whether such future interest may at that time be vested or contingent.

Signed, sealed, published and declared as and for her last will and testament by the above named Margaret Weyerhaeuser Jewett known to us to be such in the presence of us who at her request in her presence and in the presence of each other do attest and subscribe the same as witnesses on the day and year written above her signature.

1. Daniel L. Brown
2. Mary A. Casey
   5 Maine Terrace, Somerville
3. Mary C. O'Leary
   73 Litchfield St., Brighton

In Witness Whereof I do hereto set my hand and seal in the presence of three credible witnesses publish and declare this instrument written on fourteen (14) numbered sheets, one side only of each being used, and each sheet except the last having been initialled by me at the bottom, to be my last will and testament this 18th day of October 1934.

Margaret Weyerhaeuser Jewett (L.S.)

A true copy. Attest: (s) Kenrick A. Sparrow, Register

Exhibit 6-F to Stipulation of Facts entered October 25, 1977:

ESTATE OF MARGARET WEYERHAEUSER JEWETT

GEORGE F. JEWETT, JR. DISCLAIMER

WHEREAS, MARGARET WEYERHAEUSER JEWETT, late of Falmouth, County of Barnstable, Commonwealth of Massachusetts, died on January 14, 1939, leaving a will which was proved and allowed by the Probate Court of said County on February 14, 1939, and

WHEREAS, CLAUSE EIGHTH of said will created a trust for the benefit of her husband, JAMES R. JEWETT, during his lifetime and thereafter for the benefit of her daughter-in-law, MARY C. JEWETT (now MARY C. GAISER), and her son, GEORGE F. JEWETT (now deceased), and

WHEREAS, discretionary payments of income are now being made to MARY C. GAISER pursuant to the provisions of Subparagraph 3 of Paragraph B of said CLAUSE EIGHTH by the Trustees of the aforesaid, and

WHEREAS, the undersigned, as a son of MARY C. GAISER and the late GEORGE F. JEWETT, has an interest in fifty percent (50%) of the trust estate, including accumulations of income transferred to principal under the provisions of Paragraph B of CLAUSE NINTH provided that he survives said MARY C. GAISER, and

WHEREAS, the undersigned wishes to renounce his right to receive ninety-five percent (95%) of the aforesaid fifty percent (50%) of the remainder of the trust estate upon the death of MARY C. GAISER (but not including the right to receive fifty percent (50%) of the accumulations of income, if any there be, occurring after the execution of this disclaimer).

NOW, THEREFORE, the undersigned, said GEORGE F. JEWETT, JR., hereby irrevocably renounces and disclaims his right, if any, to ninety-five percent (95%) of the aforesaid fifty percent (50%) of the trust estate upon termination, provided,

however, that this disclaimer shall not act upon any interest he may have in any accumulations of income which may occur after the date set forth below.

IN WITNESS WHEREOF said GEORGE F. JEWETT, JR. has hereunto set his hand and seal, in triplicate, this 30th day of August, 1972.

(s) George F. Jewett, Jr.

STATE OF CALIFORNIA
San Francisco, ss. August 30, 1972

Then personally appeared before me the above-named GEORGE F. JEWETT, JR. and acknowledged the foregoing to be his free act and deed.

(s) LOUIS J. OLIVERO
Notary Public
My Commission Expires:

(SEAL)
OFFICIAL SEAL
LOUIS J. OLIVERO
NOTARY PUBLIC—CALIFORNIA
City & County of San Francisco
My Commission Expires Sept. 30, 1973

Exhibit 7-G to Stipulation of Facts entered October 25, 1977:

ESTATE OF MARGARET WEYERHAEUSER JEWETT

GEORGE F. JEWETT, JR. DISCLAIMER #2

WHEREAS, MARGARET WEYERHAEUSER JEWETT, late of Falmouth, County of Barnstable, Commonwealth of Massachusetts, died on January 14, 1939, leaving a will which was proved and allowed by the Probate Court of said County on February 14, 1939, and

WHEREAS, CLAUSE EIGHTH of said will created a trust for the benefit of her husband, JAMES R. JEWETT, during his lifetime and thereafter for the benefit of her daughter-in-law, MARY C. JEWETT (now MARY C. GAISER), and her son, GEORGE F. JEWETT (now deceased), and

WHEREAS, discretionary payments of income are now being made to MARY C. GAISER pursuant to the provisions of Subparagraph 3 of Paragraph B of said CLAUSE EIGHTH by the Trustees of the aforesaid, and

WHEREAS, the undersigned, as a son of MARY C. GAISER and the late GEORGE F. JEWETT, has an interest in fifty percent (50%) of the trust estate, including accumulations of income transferred to principal under the provisions of Paragraph B of CLAUSE NINTH provided that he survives the said MARY C. GAISER, and

WHEREAS, on August 30, 1972, the undersigned executed a disclaimer renouncing his right to receive ninety-five percent (95%) of the aforesaid fifty percent (50%) of the remainder of the trust estate upon the death of MARY C. GAISER (but not including the right to receive fifty percent (50%) of the accumulations of income, if any there be, occurring after the execution of this disclaimer), and

WHEREAS, the undersigned wishes to renounce his right to receive the remaining five percent (5%) of the aforesaid fifty

percent (50%) of the remainder of the trust estate upon the death of MARY C. GAISER (but not including the right to receive fifty percent (50%) of the accumulations of income, if any there be, occurring after the execution of this disclaimer).

NOW, THEREFORE, the undersigned, said GEORGE F. JEWETT, JR., hereby irrevocably renounces and disclaims his right, if any, to the remaining five percent (5%) of the aforesaid fifty percent (50%) of the trust estate upon termination, provided, however, that this disclaimer shall not act upon any interest he may have in any accumulations of income which may occur after the date set forth below.

IN WITNESS WHEREOF said GEORGE F. JEWETT, JR. has hereunto set his hand and seal, in triplicate, this 14th day of December, 1972.

(s) GEORGE F. JEWETT, JR.

STATE OF CALIFORNIA
County of San Francisco, ss. December 14, 1972

Then personally appeared before me the above-named GEORGE F. JEWETT, JR. and acknowledged the foregoing to be his free act and deed.

(s) LOUIS J. OLIVERO
Notary Public
My Commission Expires:

OFFICIAL SEAL
LOUIS J. OLIVERO
(SEAL) NOTARY PUBLIC—CALIFORNIA
City & County of San Francisco
My Commission Expires Sept. 30, 1973

Office-Supreme Court, U.S.
FILED
MAY 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1614

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE F. JEWETT, JR., AND
LUCILLE M. JEWETT, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

WADE H. MCCREE, JR.
Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

JONATHAN S. COHEN
KARL P. FRYZEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a remainderman's disclaimers of portions of his interest in a testamentary trust were transfers subject to the federal gift tax where the disclaimers were executed approximately 33 years after the establishment of the trust, and 24 years after the remainderman attained his majority.

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In the Supreme Court of the United States

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GEORGE F. JEWETT, JR., AND
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v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court (Pet. App. A7–A19) is reported at 70 T.C. 430. The opinion of the court of appeals (Pet. App. A1–A6) is reported at 638 F.2d 93.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1980 (Pet. App. A1). The order denying a petition for rehearing was entered on February 18, 1981. The petition for a writ of certiorari was filed on March 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. 2. The relevant provisions of Section 25.2511–1(c) of the Treasury Regulations on Gift Tax (1954 Code) (26 C.F.R.) are set forth at Pet. App. A30–A31.

STATEMENT

Margaret Weyerhaeuser Jewett, the grandmother of petitioner George F. Jewett, Jr., died testate on January 14, 1939, a resident of Falmouth, Massachusetts. Her will was admitted to probate. Clause Eighth of her will created a trust for the benefit of the testatrix's husband, James R. Jewett, during his life, and thereafter for the benefit of her son, George F. Jewett, and his wife, Mary Cooper Jewett (now Mary C. Gaiser) for their lives. The trust, established under the will of a Massachusetts decedent, has a situs in Massachusetts (Pet. App. A8).

Mary C. Gaiser, the mother of petitioner, is the sole surviving life beneficiary of the trust. She was born on March 7, 1901. Petitioner was born on April 10, 1927 (Pet. App. A8–A9).

Following the death of the surviving life beneficiary, the will provided for distribution of the trust remainder in equal shares to the children of George F. Jewett then living. Petitioner would be entitled to a share of the trust remainder if he survived his mother. If petitioner failed to survive his mother, the share to which he would have been entitled if he had survived would pass to his issue by right of representation (Pet. App. A9).

On August 30, 1972, petitioner executed an instrument entitled "Estate of Margaret Weyerhaeuser Jewett/George F. Jewett, Jr. Disclaimer" (Pet. App.

A9). The instrument provided in part (Pet. App. A9–A10):

> WHEREAS, MARGARET WEYERHAEUSER JEWETT, late of Falmouth, County of Barnstable, Commonwealth of Massachusetts, died on January 14, 1939, leaving a will which was proved and allowed by the Probate Court of said County on February 14, 1939, and
>
> WHEREAS, CLAUSE EIGHTH of said will created a trust for the benefit of her husband, JAMES R. JEWETT, during his lifetime and thereafter for the benefit of her daughter-in-law, MARY C. JEWETT (now MARY C. GAISER), and her son, GEORGE F. JEWETT (now deceased), and
>
> WHEREAS, discretionary payments of income are now being made to MARY C. GAISER pursuant to the provisions of Subparagraph 3 of Paragraph B of said CLAUSE EIGHTH by the Trustees of the aforesaid, and
>
> WHEREAS, the undersigned, as a son of MARY C. GAISER and the late GEORGE F. JEWETT, has an interest in fifty percent (50%) of the trust estate, including accumulations of income transferred to principal under the provisions of Paragraph B of CLAUSE NINTH provided that he survives said MARY C. GAISER, and
>
> WHEREAS, the undersigned wishes to renounce his right to receive ninety-five percent (95%) of the aforesaid fifty percent (50%) of the remainder of the trust estate upon the death of MARY C. GAISER (but not including the right to receive fifty percent (50%) of the accumulations of income, if any there be, occurring after the execution of this disclaimer).
>
> NOW, THEREFORE, the undersigned, said GEORGE F. JEWETT, JR., hereby irrevocably renounces and disclaims his right, if any, to ninety-five percent (95%) of the aforesaid fifty percent

(50%) of the trust estate upon termination, provided, however, that this disclaimer shall not act upon any interest he may have in any accumulations of income which may occur after the date set forth below.

On December 14, 1972, petitioner executed an instrument, in the same form as the document he executed on August 30, 1972, by which he disclaimed his remaining 5 percent interest in his share of the trust remainder (Pet. App. A10).

The value of the entire trust corpus was $7,912,393.63 on August 30, 1972, and $8,398,038.37 on December 14, 1972 (Pet. App. A10).

Petitioner filed gift tax returns for the calendar quarters ending September 30, 1972, and December 31, 1972, in which he notified the Commissioner of Internal Revenue of his execution of the disclaimers, but did not report as gifts any amount with respect to his interest in the trust.[1] On audit, the Commissioner determined that petitioner's disclaimers were transfers subject to the gift tax, and determined deficiencies of approximately $750,000. In this action brought by petitioner in the Tax Court for a redetermination of the deficiencies, the Tax Court held that petitioner's disclaimers of his one-half interest in the trust remainder, which were not made until 33 years after the trust was created and 24 years after he reached his majority, were not made within a reasonable time after he learned of the bequest, as required by Treasury Regulations on Gift Tax (1954 Code) (26 C.F.R.), Section 25.2511–1(c). The court accordingly ruled that petitioner's disclaimers

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[1] Petitioner's wife, Lucille M. Jewett, elected to consent to treat the gifts as made by both her and her husband under Section 2513 of the Code and the gift tax returns were filed accordingly (Pet. App. A8).

were taxable gifts under Sections 2501(a) and 2511(a) of the Code (Pet. App. A11–A18).

The court of appeals affirmed, with one judge dissenting. It held that under Section 25.2511–1(c) of the Treasury Regulations, a disclaimer must be made within a reasonable time after a contingent remainderman learns of the creation of his interest. Since petitioner disclaimed his remainder interest in his grandmother's trust approximately 33 years after having learned of the creation of the interest, the court concluded that even though the disclaimers were valid and timely under Massachusetts law (Pet. App. A3), they were not made within a reasonable period of time, and therefore were taxable gifts (Pet. App. A5). In so ruling, the court acknowledged that its determination of a reasonable time for disclaiming interests for federal gift tax purposes conflicted with *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), which held that state law was determinative of the question whether a disclaimer was made within a reasonable time under Section 25.2511–1(c) of the Regulations.

DISCUSSION

1. The court of appeals correctly held that petitioner's disclaimers were gifts subject to the gift tax under Sections 2501 and 2511 of the Code.

Sections 2501(a) and 2511(a) of the Code impose a tax upon "the transfer of property by gift," whether the transfer is in trust or otherwise, and whether the gift is "direct or indirect." Congress intended that the term "property" in this provision be used in its "broadest sense * * * reaching every species of right or interest protected by law and having an exchangeable value." It also intended to use the term "indirect" in the "broadest and most comprehensive sense," and to tax "all transactions * * * whereby, and to the extent

* * * that, property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment." H.R. Rep. No. 708, 72d Cong., 1st Sess. 27–28 (1932); *Robinette* v. *Helvering*, 318 U.S. 184, 187 n.2 (1943).

Section 25.2511–1(c) of the Treasury Regulations provides a narrow exception to this broad rule. It states in pertinent part that—

> * * * a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [*sic*] and effective under the local law. There can be no refusal of ownership of property after its acceptance. * * * In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. * * *

The Regulation establishes two separate requirements for a disclaimer to qualify as a nontaxable transfer. First, the disclaimer must be made within a reasonable time after a person learns of his rights to the property; second, the disclaimer must be unqualified, unequivocal, and effective under local law.[2]

Under this Regulation, petitioner's disclaimers were not made within a reasonable time after he learned of the existence of his remainder interest in his grandmother's trust. As the Tax Court found, petitioner did not disclaim his interest within a reasonable period of time because he waited 24 years after he attained his majority. The court of appeals found that petitioner's

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[2] It is undisputed that petitioner's disclaimers were effective under Massachusetts law (Pet. App. A3).

disclaimer—made 33 years after the creation of his interest—was not made within a reasonable period of time. On either basis, petitioner's disclaimer was not timely under the Regulation.

As the court of appeals noted (Pet. App. A5), the purpose of the Regulation is to determine whether a disclaimer, valid under state law, is nevertheless taxable as a gift. It is therefore not sufficient that a disclaimer meets all the requirements of state law, including timeliness. To qualify as a nontaxable transfer for federal gift tax purposes, a disclaimer must also satisfy a federal timeliness requirement. The reasonable time requirement of the Regulation is separate and distinct from the timeliness standard under state law.

This difference between state and federal timeliness requirements is appropriate because of the different concerns of state law and federal gift tax law. As the Tax Court explained (Pet. App. A16–A17):

> The Federal gift tax is concerned with control over the disposition of property and with exercises of the right to determine who should enjoy the fruits of ownership of property. * * * State law, by contrast, may respond to concerns such as the balancing of conflicting claims to property * * * and the protection of the rights of creditors and other third parties * * *. While a State court might be willing to accept a renunciation of nonpossessory interest after the passage of considerable time, so long as the interests of third parties have not been harmed, the passage of time is crucial to the scheme of the gift tax. With time, the potential recipient can wait to see if he himself needs the property, or whether he had better let it pass directly to the next generation.

Thus, even though petitioner's disclaimers were timely under state law, the time lag of 33 years after learning of the transfer in trust and 24 years after attaining his

majority was not a reasonable time for petitioner to disclaim his interest under Section 25.2511–1(c). The disclaimers were thus gifts subject to tax under Sections 2511 and 2501.

2. In reaching its conclusion, the court of appeals acknowledged (Pet. App. A4) that its determination of when the "reasonable time" period for disclaiming under Section 25.2511–1(c) commenced conflicted with *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir 1973).[3] There, the court ruled that because Section 25.2511–1(c) does not specify what is a "reasonable time," the federal courts must look to state law in making this determination (480 F.2d at 61). The court held that under prevailing common law, and, in particular, Minnesota law,[4] the holder of a vested remainder interest subject to divestment is allowed a reasonable time to disclaim the interest after the death of the life beneficiary, and that a disclaimer within six months is considered to be made within a reasonable time (480 F.2d at 64).

Although the court below agreed (Pet. App. A4) with the Eighth Circuit as to the general rule of timeliness of a disclaimer under state law, it concluded that state law timeliness "relates only to the validity and effectiveness of the disclaimer" (Pet. App. A5). The federal gift tax

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[3]The holding in *Keinath* was reaffirmed by the Eighth Circuit in its en banc decision in *Cottrell* v. *Commissioner*, 628 F.2d 1127 (1980). There, the court followed *Keinath* in a case involving the holder of a contingent remainder interest who also had a general power of appointment with respect to the interest. Three dissenting judges thought that *Keinath* was distinguishable because the disclaimant held extensive and ultimate control over the remainder interest through the general power of appointment (628 F.2d at 1132).

[4]Petitioner points out (Pet. 7–8) that the law in 27 states is similar to that in Minnesota.

statute, on the other hand, is concerned with the determination of those transfers Congress intended to subject to gift tax. Under state law a "transfer" to a contingent remainderman may not occur until it is indefeasibily vested. The federal gift tax statutes, however, do not require such vesting before a tax is imposed. Indeed, as the Tax Court noted (Pet. App. A14–15), if petitioner had assigned his interest in the trust without consideration, the transfer would have been subject to the gift tax. *Commissioner* v. *Procter*, 142 F.2d 824, 826–927 (4th Cir.), cert. denied, 323 U.S. 756 (1944). Moreover, the Tax Court properly emphasized (Pet App. A16) that the federal gift tax is concerned with control over the disposition of property, and the exercise of the right to determine who should enjoy property. Here, there can be no doubt that petitioner had such control and exercised such a right, for by disclaiming his remainder interest in his grandmother's trust, he transferred his interest in the trust to his issue.

3. Petitioner also argues (Pet 10–11) that the court of appeals ignored prior law permitting a disclaimer without incurring gift tax liability, as long as the disclaimer was effective and timely under state law. *Brown* v. *Routzahn*, 63 F.2d 914 (6th Cir. 1933), cert. denied, 290 U.S. 641 (1933); *Commissioner* v. *Vease's Estate*, 314 F.2d 79 (9th Cir. 1963). But those decisions did not establish the principle for which petitioner cites them. Both cases involved estate tax provisions, and did not present the specific gift tax issue raised here. At a minimum, the Commissioner's position in *Brown* v. *Routzahn* gave notice to potential disclaimants that he would advance the position asserted in this case, *i.e.*, that what is considered a reasonable time for disclaiming an interest under state law is not conclusive for federal estate tax, or, by implication, gift tax, pur-

poses.[5] Further, any reliance on *Brown* v. *Routzahn* in *Commissioner* v. *Vease's Esate* was dictum, because that case did not turn on the timeliness of a disclaimer.

Moreover, petitioner argues (Pet. 12–13) that the decision below confuses a disclaimer with a voluntary transfer. As petitioner views the matter, because a disclaimant cannot select the persons who will receive the property as a result of a disclaimer, the disclaimant has insufficient control over the property to subject the transfer to gift tax. In support of his position, petitioner again cites *Commissioner* v. *Vease's Estate*, *supra*, in which a decedent's estate contended that the property in certain trusts, in which the decedent had a life interest, was not includible in her gross estate under Section 811(c) of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)), the predecessor of Section 2036 and 2037 of the Internal Revenue Code of 1954. In *Vease's Estate*, the estate's theory was that the creation of the trusts was not a "transfer" by the decedent, and that the trusts were established pursuant to the settlement of a controversy regarding her father's will. The estate argued that the decedent renounced her interest under her father's will, and, consequently, never received any property that she could transfer. In deciding that there

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[5] To the extent petitioner argues (Pet. 11) that the application of Section 25.2511–1(c) is unreasonable or arbitrary, it should be noted that he waited some 14 years after the Regulation was adopted before disclaiming his interest. Moreover, the Commissioner's position here is consistent with the provisions in prior Regulations in effect at the time petitioner reached the age of majority. Section 86.2 of Treas. Reg. 108 (1939 Code), provided in pertinent part:

> Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interest are gratuitously passed or conferred upon another, *regardless of the means or device employed*, constitute gifts subject to tax. * * * [Emphasis added.]

had been no renunciation, the court reasoned that in negotiating the settlement agreement, the decedent had directed property to persons other than those who would have taken under her father's will had she disclaimed. But, as we have noted (*supra*, page 10), nothing in *Vease's Estate* other than dictum lends support to petitioner's contention that a disclaimer will not be subject to gift tax under Section 25.2511–1(c) as long as the disclaimant does not select the recipients of property. Indeed, if petitioner were correct, any disclaimer, no matter how untimely, would not constitute a taxable gift.

Finally, petitioner contends (Pet. 14–15) that the decision below is inconsistent with Congress' intent that the gift tax complement the estate tax. In support of this argument, petitioner relies upon the statement in *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939),[6] that the gift tax serves to supplement the estate tax, and that the two are in pari materia and must be construed together. He therefore argues (Pet. 15) that since a contingent interest (conditioned on survival) would not be subject to estate tax, its transfer should never be subject to gift tax. But petitioner's argument ignores the clarification of *Estate of Sanford* in *Smith* v. *Shaughnessy*, 318 U.S. 176, 179 (1943), where this Court stated: "Congress plainly pointed out that 'some' of the 'total gifts subject to gift taxes . . . may be included for estate tax purposes and some not,' " quoting H. R. Rep. No. 708, *supra*, at 45. As the Tax Court succinctly stated in its order denying petitioner's "Motion for Reconsideration of Findings and Opinion" (Pet. App. A23):

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[6]*Estate of Sanford* involved the question whether there was a completed gift when the donor reserved certain powers to change the disposition of the property.

> * * * the gift tax clearly applies to the gratuitous transfer of valuable property rights notwithstanding the fact that such rights, like a simple life estate, might under certain circumstances terminate on or before the death of a donor and therefore escape inclusion in the gross estate.

4. Although we believe that the decision below is correct, we agree with petitioner that it conflicts with that of the Eighth Circuit in *Keinath* v. *Commissioner*, *supra*, 480 F.2d 57. Moreover, we are advised by the Internal Revenue Service that the question presented is of considerable administrative importance. There are 13 other cases involving the same question now pending administratively or in litigation, with approximately $10.7 million in revenue at stake. Apart from the court below and the Eighth Circuit, appeals in these cases would also lie in four additional circuits that have not spoken on the question. The conflict of decisions is therefore expected to persist.

On the other hand, the continuing importance of the question has been somewhat diminished by the enactment of Section 2518 of the Code in Section 2009(b)(1) of the Tax Reform Act of 1976, Pub. L. No. 94–455, 90 Stat. 1893. This new provision contains a nine-month rule for the disclaimer of any interest created after December 31, 1976. However, for any interest created prior to 1977, the "reasonable time" rule contained in Section 25.2511–1(c), as interpreted in *Keinath* and the instant case, will continue to apply. For this reason, it is expected that gift tax controversies between disclaimants and the Internal Revenue Service with respect to interests created prior to 1977 will be litigated for a substantial future period. Accordingly, despite the enactment of Section 2518, we do not oppose the petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 80-1614

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE F. JEWETT, JR.
and
LUCILLE M. JEWETT,
PETITIONERS,
v.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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I

QUESTIONS PRESENTED FOR REVIEW

1. Is an unequivocal and effective disclaimer of a contingent remainder interest under a trust, made prior to the death of the life beneficiary, a taxable transfer for federal gift tax purposes?

2. Under Treasury Regulation §25.2511-1(c) does the "reasonable time" for disclaimer of a contingent remainder interest begin to run from the date of creation of the remainder interest or from the date of death of the life beneficiary?

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In the
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GEORGE F. JEWETT, JR.
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PETITIONERS,
v.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

The Petitioners George F. Jewett Jr. and Lucille M. Jewett respectfully pray that the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 9, 1980 be reversed.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 638 F.2d 93 (9th Cir. 1980), 47 AFTR 2d 151, 212, and is reprinted at A-1 through A-6.[1] The

[1] References herein to the Joint Appendix are denoted "J.A. 1" and to documents included in the Appendix to the Petition for Certiorari "A-1".

opinion of the United States Tax Court is reported at 70 T.C. 430 (1978), CCH Tax Ct. Dec. ¶35,213 (1978), and is reprinted at A-7 through A-19, as amended by Order reprinted at A-23 through A-25.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered and entered on December 9, 1980. A petition for rehearing was denied by Order entered on February 18, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes and Regulations

I.R.C. §2501. *Imposition of Tax.*

(a) *Taxable Transfers* —

(1) *General Rule.* — A tax, computed as provided in section 2502, is hereby imposed for each calendar quarter on the transfer of property by gift during such calendar quarter by any individual, resident or nonresident.

* * *

I.R.C. §2511. *Transfers in General.*

(a) *Scope.* — Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

* * *

Treasury Regulation §25.2511-1(c), 26 C.F.R. 25.2511(c): The text of 26 C.F.R. §25.2511-1(c) is set forth at A-30 - A-31.

Statement of the Case

1. *Statement of Facts*

Margaret W. Jewett (hereinafter "the Testatrix") died on January 14, 1939, leaving a will which created a trust for the benefit of her husband during his lifetime and thereafter for the benefit of her son and daughter-in-law (George F. Jewett, Jr.'s parents) during their lifetimes (A-21). On the death of their survivor, the will directs distribution of the remainder to her son's then-living children. The share of any then-deceased child is to be distributed directly to his issue.

The Testator's husband and son died prior to 1972. (A.-21) The remaining life beneficiary, George F. Jewett, Jr.'s mother, is still living. (A-21)

Under the trust, George F. Jewett, Jr. (hereinafter "Jewett"), would become entitled to a share of the trust remainder only if he survives his mother. (A-21)

In 1972, while his mother was still alive, Jewett executed disclaimers of his contingent remainder interest in the trust. (A-21-A-22) Those disclaimers were unequivocal and effective under the governing state law (Massachusetts). (A-3)

Jewett and his wife disclosed the disclaimers on their 1972 United States Gift Tax Returns, but did not report them as taxable transfers for federal gift tax purposes. (A-10)

In February 1976, the Internal Revenue Service issued Notices of Deficiency asserting that the disclaimers were taxable transfers. (See A-10-A-11)

2. *Proceedings Below*

On May 5, 1976, petitioners filed a Petition in the United States Tax Court for the redetermination of the deficiencies determined by the I.R.S. (J.A. 1). Jurisdiction in the Tax Court existed pursuant to 26 U.S.C. §7442 and §6213. That Petition alleged that the Notices of Deficiency erroneously determined that the disclaimers were taxable transfers for federal gift tax purposes.

On June 13, 1978, the Tax Court filed an Opinion (A-7) holding that Jewett's disclaimers were taxable transfers for federal gift tax purposes. It was undisputed that the law of Massachusetts governs the validity and effectiveness of Jewett's disclaimers. (A-2, A-3). The Tax Court conceded that the disclaimers were unequivocal and effective under Massachusetts law (A-12), but asserted that they were not timely under Treasury Regulation §25.2511-1(c), because the "reasonable time" provision of that Regulation must be measured from the date of death of the Testatrix (in 1939) rather than from the date of death of the life beneficiary (who is still living) (A-14, A-15).

Petitioners filed a Motion for Reconsideration, which was denied on July 19, 1978 (A-26). Also on July 19, 1978, the Tax Court issued an Order amending its July 13, 1978 Opinion in certain respects, without changing the result (A-23).

On August 17, 1978, Decision was entered by the Tax Court in accordance with its Opinion of June 13, 1978, as amended (A-27).

On November 13, 1978, Appellants filed their Notice of Appeal to the Court of Appeals for the Ninth Circuit.

In an Opinion filed on December 9, 1980, from which one Judge dissented (A-6), the Court of Appeals for the Ninth Circuit affirmed the decision of the Tax Court (A-1), stating that a disclaimer of a contingent remainder interest must be made

within a reasonable time after knowledge of the transfer to the disclaimant. It held that the relevant "transfer" was the creation of the contingent remainder interest (by the death of the Testatrix 33 years before) rather than the possible transfer of the trust property to Jewett upon the death of the life beneficiary (which event had not, and still has not, occurred). In so holding, the Opinion expressly disagreed with the decision of the United States Court of Appeals for the Eighth Circuit in *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973). (A-4).

On December 19, 1980, petitioners filed a motion for rehearing and suggestion for rehearing *en banc*. That motion was denied on February 18, 1981. (A-29)

Petitioners filed a Petition for Certiorari to this Court on March 25, 1981, and Certiorari was granted on June 1, 1981.

Summary of Argument

A disclaimer is fundamentally different from a voluntary transfer. Treasury Regulation §25.2511-1(c) recognizes this fundamental difference. State law, both decisional and statutory, uniformly holds a renunciation of a contingent remainder interest while the life beneficiary is still alive to be a timely disclaimer, not a voluntary transfer. Treasury Regulation §25.2511-1(c) was intended to codify that common law principle, and its language is consistent with that rule.

The interpretation of Treasury Regulation §25.2511-1(c) urged by the Commissioner and adopted by the Ninth Circuit, that such a timely disclaimer constitutes a voluntary transfer for federal gift tax purposes, is incorrect. It is contrary to the language of the Regulation, it is inconsistent with tax laws intended to complement the gift tax, and it is fundamentally unfair. The position of the Commissioner should therefore be rejected and the decision of the Ninth Circuit herein should be reversed.

Argument

A. A Disclaimer Is A Refusal To Accept Ownership Of Property Rather Than A Transfer Of Property By The Disclaimant.

The federal gift tax is imposed upon "the transfer of property by gift". Internal Revenue Code §2501, 26 U.S.C. §2501. The sole issue before this Court is whether the disclaimer of a contingent remainder interest, made while that interest is still contingent, constitutes a taxable transfer for federal gift tax purposes. Analysis of that issue must start with an understanding of the nature of a disclaimer and how it differs from a voluntary transfer.

A disclaimer is a refusal to accept property *ab initio*. *Bel* v. *United States*, 452 F.2d 683, 693 (5th Cir. 1971); *City National Bank & Trust Co.* v. *United States*, 203 F. Supp. 398, 402 (S.D. Ohio 1962) aff'd, 312 F.2d 118 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963).[2] The law of disclaimer is founded on the basic property law doctrine that a transfer is not complete until acceptance by the recipient, and that no person can be forced to accept property against his will. *See Foley* v. *Allen*, 170 F.2d 434, 437 (5th Cir. 1948); 38 C.J.S., *Gifts* §29; Scott, *Trusts*, §36.1 (3rd Ed. 1967). If the potential recipient disclaims property before its transfer to him, that transfer is ineffective, the property never vests in the potential recipient, and disposition of the disclaimed property proceeds as if the disclaimant had never had any potential rights in the property.

[2] See also H.R. Rep. No. 94-658, 94th Cong., 2d Sess., reprinted in 1976 *U.S. Code Cong. & Ad. News*, Vol. 4, 2897, 3419 (disclaimer defined as a "refusal to accept the ownership of property or rights with respect to property"), and S. Rep. No. 1599, 89th Cong. 2d Sess. (1966), 1966-2 C.B. 798, 801 (disclaimer defined as "a complete and unqualified refusal to accept some or all of the rights to which one is entitled").

A fundamental distinction between a disclaimer and a voluntary transfer is that in a voluntary transfer the transferor selects the recipients of the property, while in a disclaimer the disclaimant can make no such selection. *See Keinath* v. *Commissioner, supra,* 480 F.2d at 65. When a contingent beneficiary under a trust disclaims his interest in the trust, as in this case, the disposition of the disclaimed property is determined by the instrument creating the trust and the applicable state law. *Id.* It is *not* determined by the terms of the disclaimer itself.

In the instant case, the persons who will become entitled to the disclaimed property on the death of the life beneficiary are determined by the will of the Testatrix, and are *not* determined by the terms of Jewett's disclaimers.[3] Jewett's disclaimers merely renounced any future right to receive the corpus of the trust; they did not, and as disclaimers *could* not, purport to direct that future distribution.

The federal tax laws have long recognized that the effect of a disclaimer is to allow property to pass directly from the original owner to the party or parties taking as a result of the disclaimer, rather than from the disclaimant to those parties. Thus, Section 812(d) of the Internal Revenue Code of 1939 treated amounts passing to charity as a result of disclaimer by an estate beneficiary as having passed directly from the dece-

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[3] In fact, the identity of the ultimate recipients cannot even now be determined. Under Massachusetts law, it is likely (although not certain), that the share to which Jewett would have been entitled, had he survived the life beneficiary without disclaiming, will be distributed to Jewett's issue (if any) living on the death of the life beneficiary, in shares determined by right of representation (i.e., according to the provisions of the will as if Jewett had predeceased the life beneficiary). See Mass. Gen. Laws c. 191A, §7. Of course, at this time (and *a fortiori* at the time of the disclaimers) it is impossible to determine who those persons will be or indeed whether *any* persons within that class will survive the life beneficiary.

dent to the charity, so that an estate tax charitable deduction was allowed for

> "[t]he amount of all [charitable] bequests, legacies, devises or transfers (including the interest which falls into any such bequest, legacy, devise or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return . . . .)."

26 USC §812 (1939) (carried over as Section 2055(a) of the Internal Revenue Code of 1954).

Conversely, Section 812(e)(4)(A) of the 1939 Code denied the federal estate tax marital deduction for amounts passing to third parties as a result of disclaimer by a decedent's surviving spouse, treating such amounts as having passed directly from the decedent to those parties. This provision was subsequently incorporated in Section 2056(d)(1), the successor provision of the 1954 Code.

Treasury Regulation §25.2511-1(c), at issue herein, recognizes the fundamental difference between a refusal to accept property *ab initio* and the disposition of property already owned:

> "(c) . . . . Where the law governing the administration of the decedent's estate gives a beneficiary . . . a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance . . . . In the absence of facts to the contrary, if a person fails to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property . . . ."

The central issue in this case is whether the computation of the "reasonable time" allowed by the Regulation runs from the establishment of a trust identifying the taxpayer as having a contingent remainder interest, or from the death of the life beneficiary, when ownership of the trust property passes to the taxpayer.

Two United States Courts of Appeals have addressed that question: the Ninth Circuit in the instant case and the Eighth Circuit in *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), followed in *Cottrell* v. *Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (*en banc*).

B. In Contrast With The Decision Below, The Decision Of The United States Court Of Appeals For The Eighth Circuit In *Keinath* v. *Commissioner* Was Well-Reasoned And Correct.

1. *The Opinion Below Lacked A Reasoned Basis.*

The Opinion below directly and expressly created a conflict with the only other Circuit Court of Appeals authority in point, the decision of the Eighth Circuit in *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), which was recently followed by that Circuit, sitting *en banc*, in *Cottrell* v. *Commissioner*, 628 F.2d 1127 (8th Cir. 1980). In those decisions the Eighth Circuit had held that the "reasonable time" provision of Treasury Regulation §25.2511-1(c) must be computed from the date of the death of the life beneficiary, not the date of the establishment of the trust identifying the taxpayer as having a contingent remainder interest.

The Ninth Circuit's opinion, in rejecting the *Keinath* rule, is sparse in its reasoning. In essence, it discussed *Keinath*, stated: "We must respectfully disagree", and without further explanation held that the timeliness of the disclaimer for federal tax purposes was measured from the creation of the trust rather than from the death of the life beneficiary. (A-4, A-5.)

To the extent a rationale appears for this ruling, it seems to have been somewhat as follows:

1. A contingent remainder interest is "property", the voluntary transfer of which by Jewett would be subject to the gift tax. (A-2)

2. The federal standard of timeliness is imposed over and above state law requirements. (A-5)

3. Under federal law, the disclaimer by Jewett had to be made within a reasonable time after the "transfer" (actually, the creation) of the contingent remainder interest to him. (A-5)

Points 1 and 2 may be correct. However, they do not logically compel the conclusion in point 3. In fact, the Ninth Circuit's opinion offers no explanation whatsoever of the rationale for the holding in point 3.

2. *The Eighth Circuit had a Reasoned Basis for the Keinath Decision.*

Had this case arisen in the Eighth Circuit, *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), would have been directly controlling and dispositive. In *Keinath*, as in the instant case, a testamentary trust provided income to a life beneficiary (the testator's widow), and upon her death the remainder was to be distributed outright to the testator's sons, with the share of any then-deceased son to be distributed to that son's issue. As in the instant case, the designated remaindermen (the testator's sons) would take nothing if they did not survive the life beneficiary.

Less than six months after the death of the life beneficiary, but nineteen years after the death of the testator, one of the sons filed a disclaimer of his interest. In *Keinath*, as in the instant case, the issue was squarely presented as to whether the disclaimer was executed within a "reasonable time" under Treasury Regulation §25.2511-1(c).

The Eighth Circuit recognized that there is no definition in the Internal Revenue Code or Treasury Regulations, or anywhere else in the federal law, of the term "reasonable time" or of the starting point for the computation of a "reasonable time." However, the Eighth Circuit properly recognized that Treasury Regulation §25.2511-1(c) was "a codification of common law principles applicable to the doctrine of disclaimers," 480 F.2d at 61, and stated:

> "In determining 'reasonable time' and the related issue of when the reasonable time period commences, we perforce, absent a federal statute or regulation defining reasonable time, must look to the law of the states. We are not conclusively bound by the state law, but this is the only field to probe for legal decisions and discussions on the phrase 'reasonable time' as used in the context of making valid disclaimers." *Id.* at 61-2. (Footnote omitted)

The Eighth Circuit found the state law precedents to be unanimous:

> "The appellants maintain, without any refutation by the Commissioner, that all of the authorities who have considered this question have concluded that the time in which a remainder interest subject to divestiture must be disclaimed commences upon the death of the life beneficiary. . . . We have found no contrary authority and think that this is the prevailing common law rule. . . ." 480 F.2d at 64.

Having reviewed the relevant state decisional law, the Eighth Circuit concluded that:

> ". . . the holder of a vested remainder interest subject to divestiture has a reasonable time within which to renounce or disclaim the remainder interest after the death of the life beneficiary and that an unequivocal disclaimer filed within six months thereof is made within a reasonable time." 480 F.2d at 64.

The Eighth Circuit found this rule to be "sound in principle and reason," because:

> "A remainder subject to divestment does not convey or transfer any actual control or current beneficial interest in property to the remainderman .... In the instant case the remainderman Cargill had really nothing to accept or renounce by way of beneficial ownership or control of the property until he succeeded in outliving the life beneficiary." *id.*

Its conclusion was therefore consistent with the leading cases of *Corliss* v. *Bowers*, 281 U.S. 376 (1930) and *Estate of Sanford* v. *Commissioner*, 308 U.S. 39 (1939), which set forth the principle that "taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed," 281 U.S. at 378, 308 U.S. at 43.

The *Keinath* rule thus represents a reasoned, principled and persuasive interpretation of the Regulation, and as such it stands in sharp contrast with the decision of the Ninth Circuit in this case.

C. Treasury Regulation §25.2511-1(c) Is A Codification Of The Common Law Of Disclaimer.

The Eighth Circuit in *Keinath* considered Treasury Regulation §25.2511-1(c) to be "a codification of the common law principles applicable to the doctrine of disclaimers," 480 F.2d at 61. That reading was consistent with the regulatory language and the existing law at the time the Regulation was adopted. The Regulation was intended to codify and clarify the common law, not to change it.

Treasury Regulation §25.2511-1 was first published, in proposed form, on January 3, 1957. At that time the leading case on the federal tax impact of disclaimers was *Brown* v. *Routzahn*, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641

(1933), which established the thereafter universally accepted rule that a disclaimer which is effective and timely under the governing state law is not a taxable transfer for federal tax purposes. *Commissioner* v. *Vease's Estate*, 314 F.2d 79, 88 (9th Cir. 1963).

Brown involved a disclaimer by a husband, shortly before his death, of a bequest made to him by his predeceased wife. The Commissioner contended that the disclaimer was a transfer in contemplation of death for purposes of the federal estate tax. Under state law the husband was entitled to disclaim his interest in his wife's estate at any time prior to actual distribution of the estate by the testamentary trustees, and that distribution did not take place until after the disclaimer, some eight years after the wife's death. The United States Court of Appeals for the Sixth Circuit held that since the disclaimer was effective and timely under state law, the transfer of property from the wife to the husband was never completed, and accordingly there could be no subsequent transfer by him in contemplation of death. Refusal to accept a gift of property was not a transfer of an interest in the property.

Brown v. *Routzahn* was recognized as establishing that:

> "... the federal tax on transfers ... is levied on the transfer of property; not on the exercise of a right to renounce testamentary gifts. Accordingly, if under local law a legatee or devisee has the option of accepting or rejecting his testator's bounty, rejection of the gift does not result in a taxable transfer to its residuary recipient."

Commissioner v. *Vease's Estate*, 314 F.2d 79, 88 (9th Cir. 1963).

The logical corollary to *Brown* v. *Routzahn*, under the common law of disclaimer extant at the time the Regulation was promulgated, was *Hardenbergh* v. *Commissioner*, 198 F.2d

63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952), where under local law the disclaimant had *no* option of accepting or rejecting a decedent's bounty. In *Hardenbergh*, the taxpayers' father died intestate, and under state law, ownership of the decedent's estate vested automatically and immediately in the taxpayers and a third heir, without any need for acceptance or option of rejection by the recipient, subject only to a qualified vesting of legal title in the administrator of the estate solely for purposes of administration. The taxpayers renounced their interest in the estate, but the court held that since under state law title had already vested in the taxpayers the renunciation was a taxable transfer of the taxpayers' property to the non-disclaiming heir.

Treasury Regulation §25.2511-1(c), as originally published in proposed form on January 3, 1957, was an attempt to restate the common law of disclaimer as expressed in *Brown* and *Hardenbergh*. The proposed Regulation provided:

> "... *The renunciation of a vested property interest*, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, *constitutes a gift* to those persons who receive the property interest by means of the renunciation. *On the other hand the renunciation* of a gift, bequest or inheritance, *if under local law title does not immediately vest, is not a gift* if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. The renunciation must be unequivocal and effective under local law. A renunciation is a complete and unqualified refusal to accept the property to which one is entitled. There can be no renunciation of property after its acceptance ...." (Emphasis added)

22 Fed. Reg. at 58 (1/3/57).

The adoption of the "vested property interest" language, the specific mention of "the interest of an heir or next of kin" and the concept of immediate vesting of title defeating a disclaimer were manifestly taken from *Hardenbergh*. *See* 198 F.2d at 66.

In the final version of the Regulation, published on November 15, 1958, the language was changed somewhat, but the intent to adopt the common law of disclaimer was still clear:

> "(c) .... *Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent* (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), *a refusal to accept ownership does not constitute the making of a gift* if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin ...." (Emphasis added)

23 Fed. Reg. at 8910 (11/15/58).

The change in language from "renunciation of a vested property interest" to "refus[al] to accept ownership of property transferred from a decedent" appears to have been a deliberate effort to harmonize the *Hardenbergh* "vesting" language with the general common law principles stated in *Brown* v. *Routzahn*, while continuing to leave to state law the definition of those rights which are subject to disclaimer.

The language of the proposed Regulation, "within a reasonable time after knowledge of the existence of the *interest*" (emphasis supplied), might have supported the Ninth Circuit's view. In that sentence and in context the word "interest" could only have referred to some form of property interest *other than a vested property interest*, and it might well have encompassed a contingent remainder interest. However, in the Regulation as promulgated, the word "interest" has been changed to "transfer," a word used throughout the Regulation to mean the passing of "ownership of property" from the decedent. That change, which must be considered to have been deliberate, brought the Regulation into conformity with preexisting law by allowing a disclaimer upon the actual transfer of ownership to the disclaimant, rather than when the disclaimant was given only an "interest" in the decedent's property.

D. The Regulation Should Be Interpreted To Harmonize With Unanimous State Law Authority In Support Of The *Keinath* Rule.

In reaching its decision in *Keinath* the Eighth Circuit carefully reviewed the applicable state law, and found that "*all of the authorities* who have considered this question have concluded that the time in which a remainder interest subject to divestiture must be disclaimed commences upon the death of the life beneficiary . . . We have found *no contrary authority*." (emphasis supplied) 480 F.2d at 64.

Like the Eighth Circuit, the petitioners have been unable to find any "contrary authority." The statutes of at least 34 states expressly provide that disclaimers of contingent remainder interests can be made before the expiration of a certain period of time (generally six or nine months) after the death of the life

beneficiary.[4] Other states have adopted the same principle in decisional law. E.g., *Coleman* v. *Burns*, 103 N.H. 313, 171 A.2d 33 (1961) (New Hampshire). Page, Law of Wills, §49.8 (Bowe-Parker ed. 1962)

The Uniform Probate Code (1969), which has been adopted (as of January, 1981) in 14 states, specifically provides in §2-801(b)(2) (5th ed. Official 1977 Text):

> "An instrument renouncing a future interest may be filed not later than [9] months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested."

Similarly, the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1973), which has been adopted (as of January, 1981) in six states, provides in §2(b):

> "An instrument disclaiming a future interest shall be filed not later than [six] months after the event that determines that the taker of the property or interest is finally ascertained and his interest indefeasibly vested."

The Ninth Circuit's assertion that the timeliness of a remainderman's disclaimer must be measured from the creation of the remainder interest rather than from the death of the life beneficiary finds no support in state law or in the law of other

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[4] See statutes cited at A-32, plus:
Connecticut: Conn. Gen. Stat. Ann. §45-307 (West Supp. 1978) (nontestamentary gifts).
Maryland: Md. Est. & Trusts Code Ann. §9-202 (Supp. 1978).
Michigan: Mich. Stat. Ann. §§26.1236(2) & (12) (Supp. 1978).
New York: N.Y. Est., Powers & Trusts Law §2-1.11(a) (McKinney Supp. 1978).
Oklahoma: Okla. Stat. Ann. Tit. 84, §24 (West Supp. 1978).
Rhode Island: R.I. Gen. Laws §34-5-5-8 (1970).
Tennessee: Tenn. Code Ann. §31-103 (Supp. 1979).

Circuits, and the Ninth Circuit Opinion did not cite a single case, statute or secondary authority to support its conclusion. (A-4, A-5)

Until the decision below, persons contemplating a disclaimer of a contingent remainder interest could reasonably wait until the death of the life beneficiary before deciding whether to disclaim. No federal statute or regulation expressly conflicted with that principle,[5] and until 1978 the only decision of the Tax Court to the contrary had been reversed on that precise issue by the Eighth Circuit in *Keinath* v. *Commissioner, supra*, rev'g 58 T.C. 352 (1972).

The Ninth Circuit has judicially created a rule so removed from state law that Jewett, who justifiably believed that his disclaimer would not be a taxable gift, and who had not even reached the point at which a decision whether to disclaim had to be made, belatedly discovers that his disclaimer should have been made more than thirty years earlier (at the Testatrix's death in 1939), and in fact twenty years before the 1958 promulgation of Treasury Regulation §25.2511-1(c).

This Court should act to prevent the judicial creation of such a paradoxical and inequitable result, and to avoid such an unnecessary conflict between federal and state law concepts. Whenever possible the federal tax laws should be interpreted to be consistent with state law principles. *In re Nissen's Estate*, 345 F.2d 230, 234 (4th Cir. 1965) (terminology of Internal Revenue Code is to be "generally read and construed with reference to the law of the particular state"). *See Poe* v. *Seaborn*, 282 U.S. 101, 109-10 (1930) (federal income tax law must be applied consistently with the state community property law. Moreover, the regulatory background indicates that this

[5] The Tax Reform Act of 1976, P.L. 94-455, §2009(e)(2), did effect a material change as to contingent remainder interests created after 1976, as discussed *post* at 24.

Regulation was not intended to impose a fundamental conflict with state law, and it should be interpreted accordingly.

E. The Commissioner's Interpretation Of Treasury Regulation §25.2511-1(a) Is Inconsistent With The Plain Meaning Of The Regulatory Language.

Treasury Regulation 25.2511-1(c) requires that a disclaimer be made "within a reasonable time after knowledge of the existence of the transfer." The words "the transfer" refer back to the language of the first clause of the same sentence: "Where the law governing the administration of the decedent's estate gives a beneficiary . . . a right to . . . refuse to accept *ownership of property transferred from a decedent* . . ." (Emphasis added). Later in the regulation this "transfer" is similarly referred to as "a transfer . . . of *ownership of the decedent's property*." (Emphasis added).

Giving those words their ordinary meaning, the term "ownership of the decedent's property" at the very least must include outright ownership. In the instant case, Jewett cannot receive outright ownership of the Testatrix's property until the death of his mother. No "transfer" of such ownership to Jewett takes place until and unless he survives his mother. According the regulatory language its plain meaning he then would have a reasonable time after the "transfer" occasioned by his mother's death in which to disclaim ownership of the Testatrix's property, without fear that his refusal to accept outright ownership would constitute a gift to the residuary beneficiaries.

The Commissioner contends, however, that the right to disclaim is not so straightforward. He contends that as soon as Jewett received *any* interest in the decedent's property, including a contingent remainder interest — one which is fixed neither in quality nor in quantity and which may result in Jewett receiving nothing — he received "ownership of the

decedent's property." Therefore, in the Commissioner's view, if Jewett later were to receive outright ownership of the decedent's property, it would be too late to disclaim despite the plain language of the Regulation.

As Justice Frankfurter noted, when interpreting a statute the starting point is the statutory language itself. F. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 535 (1947). Regulations, moreover, because they particularize, are not as generously or expansively interpreted as statutes. *Tobin* v. *Edward S. Wagner Co.*, 187 F.2d 977, 979 (2nd Cir. 1951). The Commissioner's interpretation that the transfer of "ownership" means something inconsistent with the transfer of outright ownership should be rejected.

F. Imposition Of A Gift Tax On Jewett's Disclaimers Contravenes The Congressional Intent That The Gift Tax Law Complement The Estate Tax.

In interpreting a regulation which is not clear on its face, federal courts should look to the intent behind the statute the regulation is purporting to enforce. *Trustees of Indiana University* v. *United States*, 618 F.2d 736, 739 (Ct. Cl. 1980). "... [A] regulation must be interpreted so as to harmonize with ... and not to conflict with the objectives of the statute it implements." *Id. See United Telecommunications, Inc.* v. *Commissioner*, 589 F.2d 1383, 1390 (10th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *Usery* v. *Kennecott Copper Corp.*, 577 F.2d 1113, 1118 (10th Cir. 1977).

The gift tax was originally adopted as a "corollary" to or as "supplemental" to the estate tax. 65 Cong. Rec. 3119, 3120, 3122, 3172, 8095, 8096 (1924). The purpose of its enactment was "to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter-vivos which, but for the gifts, would be subject ... to the tax laid upon transfers at death." *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939). The intent of Congress was to achieve a "unified scheme of taxation of gifts whether made inter-vivos or at death." *Id.* at

48; R. Paul, *Federal Estate and Gift Taxation*, §15.04 (1942). The reports of both the House and Ways and Means Committee and the Senate Finance Committee on the 1932 gift tax statute emphasize that the gift tax was designed:

> to impose a tax which measurably approaches the estate tax which would have been payable on the donor's death had the gifts not been made and the property given had constituted his estate at his death. The tax will reach gifts not reached, for one reason or another, by the estate tax.

H.R. Rep. No. 708, 72d Cong., 1st Sess., 28 (1932); S. Rep. No. 655, 72d Cong., 1st Sess. (1932), 40.

The federal gift tax and the federal estate tax "are *in pari materia* and must be construed together." *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939). The federal gift tax, I.R.C. §2501, taxes "the transfer of property by gift"; the federal estate tax, I.R.C. §2033, taxes "all property to the extent of the interest therein of the decedent at the time of his death." If the taxpayer does not transfer property during his lifetime, that "property" will remain in his estate, and be subject to the federal estate tax at his death.

It is well settled that a contingent remainder interest is not "property" includable in the remainderman's gross estate if he dies prior to the life beneficiary. *Estate of Williams* v. *Commissioner*, 62 T.C. 400 (1974). *See also Lee* v. *United States*, 63-1 USTC Para. 12,128 (S.D. Tex. 1962).[*]

If Jewett had predeceased his mother, therefore, the Testatrix's property would not have been subject to federal estate tax as part of his estate because her property would never have come into his estate. Similarly, as a result of Jewett's disclaimers

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[*] Conversely, a vested remainder interest (not subject to divestment, i.e., where the remainderman's estate will become entitled to it if he dies before it becomes possessory) *is* considered "property" includable in the remainderman's gross estate for federal estate tax purposes. *Dauphin Deposit Trust Co.* v. *McGinnes*, 324 F.2d 458 (3d Cir. 1963); *Estate of Hamilton* v. *Commissioner*, 35 T.C.M. 1609 (1976), *aff'd*, 3d Cir., April 12, 1978 (unpublished opinion), Fed. Est. & Gift Tax Rep. (CCH) Para. 19,013.

the Testatrix's property will never come into Jewett's estate. In either situation the terms of the Testatrix's will provide that her property will pass to others. Yet the Commissioner would impose a gift tax on that property in the one instance (disclaimer) while no estate tax would be imposed in the other (Jewett's death). Instead of creating "a unified system of taxation," which Congress intended, the Commissioner would apply the gift tax inconsistently with the estate tax, creating confusion and disharmony between the two taxes.

Similarly, imposition of the gift tax because of Jewett's disclaimers would be inconsistent with the specific treatment of analogous transactions under the estate and gift tax statutes. For example, the passage of property as the result of a disclaimer might be compared with the transfer of property pursuant to the exercise of a limited power of appointment. The holder of a limited power of appointment has broad control over the disposition of the appointive property, since he has the ability to select the recipients of property (though only among a specified class of donees). However, a disclaimant has no such control over the disposition of the disclaimed property. Rather, the disposition is controlled by the original instrument. The exercise (or non-exercise) of a limited power of appointment is not considered a taxable transfer, I.R.C. §2514, nor is property subject to a limited power of appointment includible in a decedent's gross estate, I.R.C. §2041, because the holder of the power does not have sufficient control over the appointive property. *A fortiori*, a disclaimer, involving a lesser degree of control, should not be considered a taxable transfer.

Indeed, the Commissioner has himself relied on the same distinction between a disclaimer, after which the property passes to others independent of any control by the disclaimant, and a transfer, in which the transferor exercises control over who receives the property. In Revenue Ruling 76-156, 1976-1 C.B. 292, a decedent's will provided:

> "In the event that any of my issue renounce his or her interest in my estate arising under this clause, such issue shall have the right to appoint all or any part of such interest, subject to any conditions, trusts and restrictions as such renouncing issue may determine, to any of my issue and the spouses of any of my issue."

One of the decedent's children renounced his bequest and appointed his share to persons other than those who would have taken under the will and governing state law had the disclaimer not been coupled with the exercise of the power of appointment. The IRS held that the disclaimer, because it was coupled with the exercise of the power of appointment, constituted a taxable gift by the decedent's child, because the child "has availed himself . . . of a positive opportunity to personally direct the ultimate disposition of the property in which [he] supposedly has renounced the ownership interest" and has "caused the property to be disposed of in a manner that was not specifically ascertainable from the terms of the decedent's will." Id. at 293.

To impose a gift tax on a transaction in which the disclaimant exercises less dominion or control over the property than a person who exercises a tax-free limited power of appointment is both inconsistent and fundamentally unfair.[7]

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[7] Unlike property subject to a limited power of appointment, property subject to a general power of appointment is included in a decedent's gross estate for federal estate tax purposes, and its exercise is a taxable transfer for federal gift tax purposes. I.R.C. §§2041, 2514. As with other areas of the federal tax law, the critical factor in the distinction between a general power of appointment and a limited power is the degree of control the taxpayer has over the disposition of the property:

> A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner. The possessor of the power has *full authority to dispose* of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority. (Emphasis added.)

G. The Ninth Circuit Decision Would Give Impermissible Retroactive Effect To A Statute Which Congress Intended To Be Prospective Only.

Under the Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520, Congress added Section 2518 to the Internal Revenue Code, which dealt specifically with the question of the timeliness of disclaimers.

However, that new section is effective only as to interests created after December 31, 1976. P.L. 94-455, sec. 2009(e)(2), 90 Stat. at 1896. The House Report clearly recognized that, "In the case of transfers made before January 1, 1977, the rules relating to disclaimers under present [i.e., prior] law, including the period within which a disclaimer must be made, are to continue to apply ...." H.R. Rep. No. 94-1380, 94th Cong., 2d Sess., 66, reprinted in 1976 U.S. *Code Cong. & Ad. News*, vol. 4, 3431-3422. Furthermore, the House Report recognized *Keinath* as an accurate statement of the pre-existing law, *id.* at 3420, and in addition recognized that under the pre-existing law

> the Federal tax consequences of a disclaimer will largely depend upon its treatment under local law, i.e., its treatment as a disclaimer so that the person disclaiming is not considered to have held title to the property at any time. *Id.* at 3420.

H.R. Rep. No. 767, 65th Cong. 2d Sess. (1918), reprinted in 1939-1 C.B. 86, 101.

As Chief Judge Kaufman noted in *Estate of Rolin* v. *Commissioner*, 588 F.2d 368, 370 (2d Cir. 1978), the clear congressional purpose in enacting §2041 of the Internal Revenue Code (taxing general powers of appointment), and its predecessors, was "merely to ensure that since the possessor of a general testamentary power of appointment may control the disposition of the property after his death as fully as the owner of a simple title, such powers are taxed in the same manner as outright ownership."

Judge Harris in his dissent in the Ninth Circuit expressly articulated the problem of retrospectivity that the majority decision created:

> "The Congress, in the Tax Reform Act of 1976, acted to override the *Keinath* rule, but only prospectively. The effect of the decision of the majority is to give to the 1976 Amendments the retrospective effect which the Congress expressly rejected." (A-6)[8]

By refusing to apply the *Keinath* rule to a pre-1977 trust, the Ninth Circuit contravened the Congressional intent that its amendment of the law in response to *Keinath* be applied prospectively only.

H. If Treasury Regulation §25.2511-1(c) Is To Be Interpreted As The Commissioner Now Urges, Its Retroactive Application To Holders Of Interests Created Prior To The Promulgation Of The Regulation Would Be Manifestly Unfair.

Until the promulgation of Treasury Regulation §25.2511-1(c) in 1958, the rule of *Brown v. Routzahn, supra*, was universally accepted, apparently even by the Commissioner. Accordingly, in reliance on *Brown*, the holder of a

[8] The new Code section provides that a "qualified disclaimer must be made within "9 months after the later of —

(A) the date on which the *transfer creating the interest* in [the disclaimant] is made, or

(b) the day on which [the disclaimant] attains age 21." (emphasis added). I.R.C. §2518 (b)(2).

A question exists as to whether "transfer creating the interest" would include a transfer creating a contingent remainder interest. Certain of the legislative history suggests to Petitioners that is does not, but that question is not before the Court. To the extent Congress may have changed the *Keinath* rule, it clearly did so prospectively only.

contingent remainder interest, such as Jewett, had no reason to disclaim his interest prior to the death of the life beneficiary (provided that such interest could still be effectively disclaimed under the governing state law).

In 1958, Treasury Regulation §25.2511-1(c) was adopted. It applied equally to disclaimers of "transfers" occurring before and after its promulgation, and it made no provision for any grace period following its enactment within which "transfers" made by instruments predating 1958 could effectively be disclaimed. Therefore, if the Regulation is to be interpreted as the Commissioner now urges, as effecting a material change from prior law, there was never a time after the proposed and final Regulations were issued at which Jewett could effectively disclaim. Under the Commissioner's view, the "reasonable time" period for Jewett's disclaimer had commenced to run at the Testatrix's death in 1939. Twenty years later, when the Regulation was promulgated in 1958, it was already far too late for Jewett to act.

Clearly, such a result would be contrary to any reasonable notion of equity or ordered justice. Holders of pre-1958 interests should not have been arbitrarily, capriciously and suddenly deprived of their existing right to refuse to accept ownership of property without the imposition of a tax.

As discussed above, resolution of the instant case turns on the meaning of the words "reasonable time after knowledge of the existence of the transfer," as that language is used in Treasury Regulation §25.2511-1(c). Since until the promulgation of that Regulation the rule of *Brown* v. *Routzahn* had been universally accepted, it would not have been unwarranted for taxpayers to assume that the word "transfer" in the context of the Regulation had the same meaning expressed in *Brown*, that is, an actual vesting of the property interest.

A clearly-stated change from that position would have drawn well-warranted criticism, and perhaps even legislative correction. At the least, it would have caused taxpayers to reevaluate any disclaimers which they had contemplated

making. The Commissioner made no such frontal attack on existing law in 1958. Rather, over fourteen years later, through his questionable interpretation of the Regulation, he appears to be making a belated attempt to legislate a change in this policy without an unambiguous articulation of the change. *Cf. Stubbs, Overbeck & Associates, Inc.* v. *United States*, 445 F.2d 1142, 1147 (5th Cir. 1971) ("It would appear that perhaps the drafter of the Ruling did a bit of legislating for the convenience of the IRS. Only Congress has the power to do this."); *Investment Annuity, Inc.* v. *Blumenthal*, 442 F. Supp. 681, 692-94 (D.D.C. 1977).

Such veiled changes in existing law are not permissible. If Treasury Regulation §25.2511-1(c) really did effect a change from the prior law, its enactment was patently inequitable to holders of pre-1958 interests, and the Commissioner abused his discretion under Section 7805(b) of the Internal Revenue Code in failing to specify that the Regulation would not be applied prospectively only. *See International Business Machines Corp.* v. *United States*, 343 F.2d 914, 920-21, 923 (Ct. Cl. 1965), *cert. denied*, 82 U.S. 1028 (1966); *LeSavoy Foundation* v. *Commissioner*, 238 F.2d 589 (3rd Cir. 1956). His action should therefore have not been upheld. *Id.; Anderson, Clayton & Co.* v. *United States*, 562 F.2d 972, 981 (5th Cir. 1977).

Conclusion

For the reasons stated above, the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 9, 1980 should be reversed and judgment entered for Petitioners.

Dated: July 16, 1981

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No. 80-1614

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE F. JEWETT, JR. AND
LUCILLE M. JEWETT, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

---

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a remainderman's disclaimers of his interest in a testamentary trust were transfers subject to the federal gift tax because they were executed 33 years after the establishment of the trust, and 24 years after the remainderman attained his majority, and therefore were not made "within a reasonable time after knowledge of the existence of the transfer," as required by the governing Treasury Regulation.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1614

GEORGE F. JEWETT, JR. AND
LUCILLE M. JEWETT, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court (Pet. App. A7-A19) is reported at 70 T.C. 430. The opinion of the court of appeals (Pet. App. A1-A6) is reported at 638 F.2d 93.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1980 (Pet. App. A1). The order denying a petition for rehearing was entered on February 18, 1981 (Pet. App. A29). The petition for a writ of certiorari was filed on March 25, 1981, and was granted on June 1, 1981 (J.A. 5). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code of 1954 (26 U.S.C. (& 1970 ed.)) are set forth at Appendix, *infra*, 1a. The relevant provisions of Section 25.2511-1(c) of the Treasury Regulations on Gift Tax (26 C.F.R.) are set forth at Appendix, *infra*, 2a-3a.

STATEMENT

1. Margaret Weyerhaeuser Jewett, the grandmother of petitioner George F. Jewett, Jr., died testate on January 14, 1939, a resident of Falmouth, Massachusetts. On February 14, 1939, her will was admitted to probate. Clause Eighth of her will created a trust for the benefit of the testatrix's husband, James R. Jewett, during his lifetime, and thereafter for the benefit of her son, George F. Jewett, and his wife, Mary Cooper Jewett (now Mary C. Gaiser) for their lives. The trust, established under the will of a Massachusetts decedent, has a situs in Massachusetts (Pet. App. A8-A9). The will provided that following the death of the surviving life beneficiary, the trust remainder would be distributed in equal shares to the children of George F. Jewett then living (J.A. 9-10).

As a child of George F. Jewett, petitioner had a contingent 50% interest in the trust remainder which would vest upon the death of the surviving life beneficiary. If petitioner failed to survive that event, the share to which he would have otherwise been entitled would pass at that time to his issue by right of representation (Pet. App. A9). Petitioner was born on April 10, 1927. Accordingly, he was 12 years old at the time of his grandmother's death, when his

interest in the testamentary trust was established (Pet. App. A9-A10, A21).

Mary C. Gaiser, the mother of petitioner, is the sole surviving life beneficiary of the trust. She was born on March 7, 1901, and was living in 1972, when petitioner disclaimed his interest in the trust in favor of his issue.

On August 30, 1972, when he was 45 years old, petitioner executed an instrument entitled "Estate of Margaret Weyerhaeuser Jewett/George F. Jewett, Jr. Disclaimer" (Pet. App. A9; J.A. 15-16). The instrument provided in part as follows (Pet. App. A9-A10; J.A. 15-16):

> WHEREAS, MARGARET WEYERHAEUSER JEWETT, late of Falmouth, County of Barnstable, Commonwealth of Massachusetts, died on January 14, 1939, leaving a will which was proved and allowed by the Probate Court of said County on February 14, 1939, and
>
> WHEREAS, CLAUSE EIGHTH of said will created a trust for the benefit of her husband, JAMES R. JEWETT, during his lifetime and thereafter for the benefit of her daughter-in-law, MARY C. JEWETT (now MARY C. GAISER), and her son, GEORGE F. JEWETT (now deceased), and
>
> WHEREAS, discretionary payments of income are now being made to MARY C. GAISER pursuant to the provisions of Subparagraph 3 of Paragraph B of said CLAUSE EIGHTH by the Trustees of the aforesaid, and
>
> WHEREAS, the undersigned, as a son of MARY C. GAISER and the late GEORGE F. JEWETT, has an interest in fifty percent (50%) of the trust estate, including accumulations of

income transferred to principal under the provisions of Paragraph B of CLAUSE NINTH provided that he survives said MARY C. GAISER, and

WHEREAS, the undersigned wishes to renounce his right to receive ninety-five percent (95%) of the aforesaid fifty percent (50%) of the remainder of the trust estate upon the death of MARY C. GAISER (but not including the right to receive fifty percent (50%) of the accumulations of income, if any there be, occurring after the execution of this disclaimer).

NOW, THEREFORE, the undersigned, said GEORGE F. JEWETT, JR., hereby irrevocably renounces and disclaims his right, if any, to ninety-five percent (95%) of the aforesaid fifty percent (50%) of the trust estate upon termination, provided, however, that this disclaimer shall not act upon any interest he may have in any accumulations of income which may occur after the date set forth below.

On December 14, 1972, petitioner executed a second instrument, in the same form as the first document he executed on August 30, 1972. Pursuant to this second instrument, petitioner disclaimed his remaining 5% interest in his share of the trust remainder (Pet. App. A10).

The validity and timeliness of petitioner's disclaimers under Massachusetts law are not in question (Pet. App. A3). The value of the entire trust corpus was $7,912,393.63 on August 30, 1972, and $8,398,038.37 on December 14, 1972 (Pet. App. A10).

2. Petitioner filed gift tax returns for the calendar quarters ending September 30, 1972, and December 31, 1972, in which he notified the Commissioner of Internal Revenue of his execution of the dis-

claimers, but did not report as taxable gifts any amount with respect to his interest in the trust.[1] On audit, the Commissioner determined that petitioner's disclaimers were not made "within a reasonable time after knowledge of the existence of the transfer" as required by Section 25.2511-1(c) of the Treasury Regulations on Gift Tax (26 C.F.R.), so that his transfers were subject to the gift tax (Pet. App. A10). Deficiencies of approximately $750,000 were accordingly determined (*id.* at A7). This proceeding was then brought by petitioner in the Tax Court seeking a redetermination of the deficiencies. In a reviewed decision, the Tax Court unanimously held that petitioner's disclaimers of his interest in the trust, which were not made until 24 years after he reached his majority, were not made within a reasonable time, as required by the pertinent Treasury Regulation. The court accordingly ruled that petitioner's disclaimers were taxable gifts under Sections 2501(a) and 2511(a) of the Code (Pet. App. A11-A18).

The court of appeals affirmed, with one judge dissenting. It held that under Section 25.2511-1(c) of the Treasury Regulations, a disclaimer must be made within a reasonable time after a remainderman learns of the creation of his interest. Since petitioner disclaimed his remainder interest in his grandmother's trust approximately 33 years after that interest was created, the court concluded that his disclaimers were not made within a "reasonable time after knowledge of the existence of the transfer"

---

[1] Petitioner's wife, Lucille M. Jewett, elected to consent to treat the gifts as made by both her and her husband under Section 2513 of the Code and the gift tax returns were filed accordingly (Pet. App. A8).

within the meaning of the Regulation and therefore were taxable gifts (Pet. App. A5). In so ruling, the court of appeals acknowledged that petitioner's disclaimers were valid and timely under Massachusetts law (*id.* at A3), and that its determination of the reasonable period of time permitted for disclaimers of interests for federal gift tax purposes conflicted with *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973) (Pet. App. A4 & n.3). As the court below reasoned, the term "transfer," as used in the Regulation, "means the transfer to the disclaimant of the property interest disclaimed by him" (Pet. App. A5). Since the transfer in this case occurred in 1939, the court of appeals concluded that petitioner's disclaimers in 1972 were not made within the requisite reasonable period of time (Pet. App. A1-A5).

SUMMARY OF ARGUMENT

1. Sections 2501(a) and 2511(a) of the Code impose a tax upon "the transfer of property by gift," whether the transfer is in trust or otherwise, and whether the gift is "direct or indirect." Congress intended to use the term "property" in this provision in its "broadest sense * * * reaching every species of right or interest protected by law and having an exchangeable value." It also intended to use the term "indirect" in the "broadest and most comprehensive sense," and to tax "all transactions * * * whereby, and to the extent * * * that, property, or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment." H.R. Rep. No. 708, 72d Cong., 1st Sess. 27-28 (1932); S. Rep. No. 665 (Pt. 1), 72d Cong., 1st Sess. 39 (1932); *Robinette* v. *Helvering*, 318 U.S. 184, 187 n.2 (1943).

Section 25.2511-1(c) of the Treasury Regulations on Gift Tax provides a narrow exception to this broad rule for certain disclaimers of property interests. The Regulation establishes two separate requirements for a disclaimer to qualify as a nontaxable transfer. First, the disclaimer must be made within a reasonable time after a person learns of his rights to the property; second, the disclaimer must be unqualified, unequivocal, and effective under local law.

Although petitioner's disclaimers were timely and otherwise effective under Massachusetts law, the disclaimers were not made within a reasonable time after petitioner learned of the existence of the "transfer," *i.e.*, the creation of his remainder interest in his grandmother's trust. As the Tax Court found, petitioner did not disclaim his interest within a reasonable period of time, because he waited 24 years after he attained his majority. The court of appeals similarly found that petitioner's disclaimers —made 33 years after the creation of his interest— were not made within a reasonable period of time. On either basis, petitioner's disclaimers were not timely under the Regulation.

As the court of appeals noted, the purpose of the Regulation is to determine whether a disclaimer valid under state law, is nevertheless taxable as a gift. It is therefore not sufficient that a disclaimer meets all the requirements of state law, including timeliness. To qualify as a nontaxable transfer for federal gift tax purposes, a disclaimer must also satisfy a federal timeliness requirement. The reasonable time requirement of the Regulation is separate and distinct from the timeliness standard under state law.

This difference between state and federal timeliness requirements arises as a consequence of the different

concerns of state property law and the federal gift tax law. The federal gift tax is concerned with control over the disposition of property and with the exercise of a right to determine those who will possess, enjoy or own property or property rights. State law is primarily concerned with balancing conflicting claims to property, and protecting the rights of creditors and other third parties. To accomplish these purposes, state law may allow considerable time to pass after a person learns of a property interest before he must disclaim. On the other hand, the passage of time is crucial under the scheme of the federal gift tax, because time allows a potential recipient to engage in planning his estate by exercising control over the future interest and to wait to see whether he himself needs the property, or whether he should choose to have it pass to the next generation. Thus, even though petitioner's disclaimers were timely under state law, the passage of 33 years after the creation of his interest by means of the transfer in trust, and 24 years after attaining his majority, far exceeded a reasonable time for petitioner to wait before disclaiming his interest under Section 25.2511-1(c). The disclaimers were thus indirect transfers subject to the gift tax under Sections 2501 and 2511.

2. *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), upon which petitioner relies, was wrongly decided. There, the court ruled that because Section 25.2511-1(c) does not specify what is a "reasonable time," the federal courts must look to state law in making this determination (480 F.2d at 61). The court held that under prevailing common law, the holder of a vested remainder interest subject to divestment is allowed a reasonable time to disclaim the interest after the death of the life beneficiary, and

that a disclaimer within six months is considered to be made within a reasonable time (480 F.2d at 64). Thus, even though the disclaimant in that case was aware of his interest for 19 years (*id.* at 60), the court held that his disclaimer was timely and did not give rise to a taxable gift.

In so ruling, the court in *Keinath* confused the two separate requirements of the Regulation and deemed the effectiveness of a disclaimer under state law to be controlling for federal gift tax purposes. But the federal gift tax statute applies to those transfers Congress intended to subject to gift tax. Under state law, a "transfer" to a contingent remainderman may not occur until it is vested indefeasibly. The federal gift tax statutes, however, do not require such vesting before a tax is imposed. For federal gift tax purposes, the contingent quality of a remainder interest simply goes to the question of value. Indeed, it is well established that if a person possessing a contingent remainder in a trust assigns his interest in the trust without consideration, the transfer is subject to gift tax. *Commissioner* v. *Procter*, 142 F.2d 824, 826-827 (4th Cir.), cert. denied, 323 U.S. 756 (1944). Thus, contrary to the *Keinath* court's analysis a contingent remainderman such as petitioner has a valuable property right for purposes of both state property law and the federal gift tax. Here, there can be no doubt that petitioner exercised control over such a valuable right, for by disclaiming his remainder interest in his grandmother's trust, he transferred his interest in the trust to his issue. His disclaimers therefore gave rise to taxable gifts.

3. Finally, petitioner argues for the first time that it would be inequitable to apply Section 25.2511-1(c) to his disclaimers of the remainder interest devised

to him in 1939 because the Regulation was promulgated in 1958. But apart from the facts that the Regulation at issue here merely provides for a narrow category of exceptions to the comprehensive statutory provision enacted by Congress in 1932 and that the Commissioner is, in any event, free to promulgate retroactive regulations that constitute the original controlling rule (*Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936)), Section 25.2511-1(c) is not in fact being applied retroactively in this case. It applies to all gifts, including disclaimers treated as gifts, made after December 31, 1954 (23 Fed. Reg. 8904 (1958)). The transaction upon which the gift tax is imposed in this case occurred in 1972, long after the effective date of the Treasury Regulation. Petitioner is not being taxed on the transfer to him of his remainder interest upon the death of his grandmother in 1939. Rather, the tax is imposed on the relinquishment of his control over the disposition of that valuable property interest at the time of the disclaimers in 1972.

Moreover, there is no basis for petitioner's claim that without a grace period, the Regulation improperly foreclosed him at the outset from making a timely disclaimer, because in 1958 he had already held his interest for 19 years, or ten years after attaining his majority. Even on the assumption that a grace period would have been appropriate upon the promulgation of the Regulation, the facts of this case are particularly ill-suited for petitioner to advance such a claim. Here, petitioner did not disclaim his interest until 1972—14 years after the promulgation of the Regulation in question. Hence, petitioner's disclaimers were neither made within a reasonable time after learning of his interest nor within the bounds of any reasonable grace period one might hypothesize.

ARGUMENT

DISCLAIMERS OF A REMAINDER INTEREST IN A TRUST ARE TRANSFERS SUBJECT TO THE FEDERAL GIFT TAX WHEN THEY ARE EXECUTED MANY YEARS AFTER THE ESTABLISHMENT OF THE TRUST AND AFTER THE REMAINDERMAN ATTAINED HIS MAJORITY BECAUSE SUCH DISCLAIMERS ARE NOT MADE WITHIN A REASONABLE TIME AFTER THE REMAINDERMAN LEARNED OF THE EXISTENCE OF HIS INTEREST IN THE TRUST

A. The broad language of the federal gift tax statute reflects Congress' intent to tax gifts whether directly or indirectly made regardless of the means or device employed

1. Section 2501 of the Internal Revenue Code of 1954 imposes a graduated tax "on the transfer of property by gift * * * by any individual resident or nonresident." The gift tax "supplemented that laid on transfers at death, which had long been a feature of the revenue laws." *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 42 (1939). By taxing gifts, Congress sought to discourage circumvention of the estate tax that would otherwise occur by means of *inter vivos* transfers that would deplete taxable estates. Congress therefore defined a taxable transfer in far-reaching terms in order to reflect its intent to tax gifts in the "broadest and most comprehensive sense," and to tax "all transactions * * * whereby[,] and to the extent * * * that[,] property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment." H.R. Rep. No. 708, 72d Cong., 1st Sess. 27-28 (1932). See also S. Rep. No. 665 (Pt. 1), 72d Cong., 1st Sess. 39 (1932). See also *Smith* v.

Shaughnessy, 318 U.S. 176, 180-181 (1943); *Robinette* v. *Helvering*, 318 U.S. 184, 187 n.2 (1943). Hence, Section 2511(a) provides that "the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, *whether the gift is direct or indirect*, and whether the property is real or personal, tangible or intangible * * *" (emphasis added).

The fact that the statute subjects transfers to tax "whether the gift is direct or indirect" shows that Congress did not intend to condition the applicability of the gift tax upon satisfaction of common law requirements such as donative intent. Hence, if a person's actions give rise to gratuitous transfers of property, the transfer is a taxable gift whether or not the transferor intended to bestow a benefit upon the transferee. It is the objective fact of the transfer that triggers the tax. As this Court stated almost 40 years ago in *Commissioner* v. *Wemyss*, 324 U.S. 303 306 (1945)—

> Had Congress taxed "gifts" *simpliciter*, it would be appropriate to assume that the term was used in its colloquial sense, and a search for "donative intent" would be indicated. But Congress intended to use the term "gifts" in its broadest and most comprehensive sense. * * * Congress chose not to require an ascertainment of what too often is an elusive state of mind. For purposes of the gift tax it not only dispensed with the test of "donative intent." It formulated a much more workable external test, that where "property is transferred for less than an adequate and full consideration in money or money's worth," the excess in such money value "shall * * * be deemed a [taxable] gift * * *."

Put another way, all transactions that result in the gratuitous transfer (or transfer for less than adequate consideration)[2] of property or property rights or interests to another, regardless of the means or device employed, constitute gifts subject to tax.

2. This case deals with a particular type of device for accomplishing a transfer of property known as a disclaimer. By means of a disclaimer, a transferee can, by refusing, to accept ownership of property, thereby indirectly cause it to pass to the next qualified person designated in a governing instrument such as a will or trust.[3] All disclaimers arguably might be deemed to fall within the broad definition of a taxable gift insofar as they indirectly accomplish a gratuitous transfer of property to another person. But the Treasury Regulations provide for a narrow exception from the gift tax for a limited category of disclaimers. Section 25.2511-1(c) sets forth the circumstances under which a gift tax-free disclaimer can be made in the following terms:

> The gift tax also applies to gifts indirectly made. * * * Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate

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[2] See Section 2512(b) of the Code.

[3] The courts have permitted disclaimers so that a person will not be compelled to accept property that he does not want, or that may be burdensome. See, *e.g.*, *Seifner* v. *Weller*, 171 S.W.2d 617, 622 (Mo. Sup. Ct. 1943); *Chilcoat* v. *Reid*, 154 Md. 378, 385, 140 A. 100, 103 (1928); *Burritt* v. *Silliman*, 13 N.Y. 93 (1855).

> property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [*sic*] and effective under the local law. There can be no refusal of ownership of property after its acceptance. * * * In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. * * *.

The question presented in this case is whether petitioner's disclaimers of his remainder interest in a testamentary trust qualified as tax-free transfers under the foregoing Regulation. The Regulation establishes two separate requirements for a disclaimer to qualify as a nontaxable transfer. First, the disclaimer must be made within a reasonable time after a person learns of his rights to the property. Second, the disclaimer must be unqualified, unequivocal, and effective under local law.[4]

It is undisputed that petitioner's disclaimers were valid and effective under Massachusetts law (Pet. App. A3). Indeed, it is axiomatic that if petitioner's disclaimers were not effective under state law, there would have been no transfers to be subject to the gift tax. Hence, this case focuses on the first requirement of the Regulation, *viz.*, that the disclaimer be made within "a reasonable time" after the person becomes aware of his interest in the property.

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[4] A disclaimer of property passing by intestacy does not qualify under the Regulation because under common law (and the general state law rule) an heir at law cannot refuse to accept his intestate share. *Hardenbergh* v. *Commissioner*, 198 F.2d 63 (8th Cir.), cert. denied, 344 U.S. 836 (1952).

Here, petitioner's disclaimers were not made within a reasonable time after he learned of the existence of his remainder interest in his grandmother's trust. That interest came into being in 1939 upon the death of his grandmother. But petitioner did not execute his disclaimers until 1972. There is nothing in the record to justify this excessive length of time. Petitioner does not claim that knowledge of the existence of his remainder interest was improperly withheld from him until 1972. Hence, one can only conclude that his delay in disclaiming his interest was purposeful. Accordingly, under the Regulation, the Tax Court properly found that petitioner did not disclaim his interest within a "reasonable" period of time because he waited 24 years after he attained his majority before executing his disclaimers (Pet. App. A15). The court of appeals likewise correctly found that petitioner's disclaimers were not made within a reasonable period of time because they were made 33 years after the creation of his remainder interest (Pet. App. A5). On either basis, petitioner's disclaimers were not timely under the first requirement of the Regulation.

We submit that there is an ample factual basis for the decision below that petitioner's disclaimers were not made within the requisite reasonable period after petitioner learned of his remainder interest and were therefore subject to the federal gift tax. Petitioner, however, argues that his disclaimers were timely because they were made during the lifetime of the life beneficiary under the trust, *i.e.*, before he ever took possession of his remainder interest under the trust. But petitioner's contention is at odds with the structure of the Regulation, which establishes two separate and independent requirements for a tax-free disclaimer: (1) validity and effectiveness under state law;

and (2) timeliness within a reasonable period after the taxpayer learns of his rights to the property. The fact that petitioner executed his disclaimers prior to his assumption of possession of the remainder interest only goes to the validity and effectiveness of the disclaimers under state law. It does not satisfy the additional requirement of the Regulation that a disclaimer be made within a reasonable period after the disclaimant learns of the existence of his interest. As we shall show, this requirement of the Regulations imposes a federal timeliness requirement that subjects to the gift tax those persons who maintain control over the disposition of property by postponing their decision to disclaim. It is precisely that type of estate planning by *inter vivos* transfer at which the gift tax is aimed. By requiring that disclaimers be made within a reasonable period after a person learns of his right to a property interest, the Regulation implements "the evident desire of Congress [in enacting the gift tax] to hit all the protean arrangements which the wit of man can devise that are not business transactions within the meaning of ordinary speech * * *" *Commissioner* v. *Wemyss*, *supra*, 324 U.S. at 306.

B. The validity of petitioner's disclaimers under state law is insufficient to bar the imposition of the gift tax because his 33-year delay in making the disclaimers enabled him to control the disposition of his interest in the trust

1. As we have noted (*supra*, page 14), Section 25.2511-1(c) of the Treasury Regulations on Gift Tax provides with respect to disclaimers that "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the

transfer." Petitioner does not challenge the validity of the Regulation. Indeed, he would bear a heavy burden if he were to do so in light of this Court's longstanding deference to Treasury Regulations unless unreasonable and plainly inconsistent with the revenue statutes. See, *e.g.*, *Commissioner* v. *Portland Cement Co.*, No. 79-1907 (Mar. 3, 1981), slip op. 12; *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476-477 (1979); *United States* v. *Correll*, 389 U.S. 299, 307 (1967).

And surely the Regulation strikes a reasonable balance in distinguishing between those disclaimers that are effective for gift tax purposes and those that are not. If a person is to be permitted to refuse to accept an interest in property and have that interest pass to a successor without gift tax consequences, it is entirely appropriate that he should also be required to manifest that refusal promptly upon learning of his right to that property interest. Indeed, if the rule were otherwise, a person could consider at length whether a disclaimer would be the most advantageous course of action, *i.e.*, whether he would prefer to receive the assets himself or allow them to pass to his successor in interest. In appraising his options, he could belatedly measure the resources available in his own estate in order to ascertain whether he should take the property interest for his own personal needs. Thus, absent a timeliness requirement, the holder of the property interest could, perhaps up to the moment of his own death—if state law posed no barrier—engage in the very type of estate planning by *inter vivos* transfers upon which the gift tax is imposed.

The facts of this case convincingly support the decision below that petitioner's disclaimers were not "made within a reasonable time after knowledge of the existence of the transfer." Here, the remainder interest that petitioner ultimately disclaimed came

into existence upon the death of his grandmother in 1939. At that time, petitioner was almost 12 years old. Assuming that in 1939 and in the years immediately thereafter, petitioner was unaware of his interest in the trust in 1948 petitioner reached the requisite age when knowledge of his affairs could be legally attributed to him. But petitioner did not disclaim his interest in 1948 or even "within a reasonable time" thereafter. He waited 24 more years—until 1972—to do so, when he was 45 years old. And when petitioner finally disclaimed his remainder interest in the trust, even then he did not put the matter to rest in a single dispositive transaction. Rather, he acted with some degree of caution and with seeming reluctance to relinquish his hold over his remainder interest. His disclaimers were made in two installments. As the record makes clear, on August 30, 1972, petitioner first disclaimed 95% of his one-half interest in the remainder but not of income thereafter accumulated (see page 32 note 12, *infra*). Then, on December 14, 1972, he executed a similar disclaimer of the remaining 5% (Pet. App. A9-A10).

Thus, at the late hour that petitioner finally disclaimed his interest in the trust—at the age of 45—he presumably had determined that he no longer had any personal need to enjoy the benefits of that interest that would accrue to him upon the death of his then 71-year-old mother.[5] In reaching this decision, at an age that was actuarially beyond his mid-life, petitioner could more accurately predict the size of his own taxable estate and the estates of those persons

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[5] Petitioner appears to be a person of substantial wealth. His gift tax returns report taxable gifts of $2,751,502 for the period 1958-1972, excluding the interests in his grandmother's trust at issue in this case (Pet. App. A18 n.5).

who would succeed to his interest. In short, petitioner's extended 33-year holding of his remainder interest and his ultimate disclaimer of it constituted a control over property and its disposition that is the essence of a taxable gift. As the Tax Court effectively characterized the scenario (Pet. App. A18; footnote omitted):

> [P]etitioner possessed for 24 years, the effective right to determine who should ultimately receive the benefits of a 50 percent remainder interest of a trust which, in 1972, had a corpus of approximately $8 million. He waited to act in respect of that remainder interest until the surviving life beneficiary was over 70 years of age and until he himself was 45 and, it appears, a man of substantial means. In 1972, by the execution of two disclaimers, he elected to let the property pass according to the alternative provisions of his grandmother's will—to the natural objects of his bounty. This, we hold, was an exercise over the disposition of property subject to the gift tax imposed by Section 2501.

2. In seeking to insulate his belated disclaimers from the gift tax, petitioner does not offer any explanation that might excuse or mitigate his delay and hesitation in making the disclaimers of his interest in the trust. As we have noted (*supra*, page 15), he does not claim that knowledge of the existence of his interest was improperly held from him. Despite the clear inference to be drawn from the undisputed facts that he was attempting to exercise control over his remainder interest for as long as possible, petitioner argues that the passage of 33 years from the date of the creation of the interest until his disclaimer is legally irrelevant.

In support of this contention, petitioner emphasizes the fact that his disclaimers were timely as a matter

of state law, which generally provides for at least a six-month period for a contingent remainderman to disclaim after his interest vests upon the death of the life beneficiary. But like the Eighth Circuit's decision in *Keinath* v. *Commissioner*, *supra*, upon which he relies,[6] petitioner's argument confuses the two requirements of Section 25.2511-1(c) of the Regulations. That provision, as we have pointed out (*supra*, pages 14-15), permits a disclaimer to be made free of gift tax if it is: (1) unequivocal and effective under local law; *and* (2) made within a reasonable time after knowledge of the existence of the transfer. The latter requirement represents a federal standard of timeliness that is separate and distinct from the timeliness standards under state law.[7] Hence, it is

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[6] The holding in *Keinath* was reaffirmed by the Eighth Circuit in its en banc decision in *Cottrell* v. *Commissioner*, 628 F.2d 1127 (1980). There, the court followed *Keinath* in a case involving the holder of a contingent remainder interest who also had a general power of appointment with respect to the interest. Three dissenting judges thought that *Keinath* was distinguishable because the disclaimant held extensive and ultimate control over the remainder interest through the general power of appointment (628 F.2d at 1132).

[7] The court in *Keinath* appeared to acknowledge the existence of a separate federal timeliness requirement. It stated (480 F.2d at 61): "Although the [taxpayers] argue for a complete state standard on the validity of a disclaimer, we think the Commissioner has the right in the Treasury Regulations to set forth the conditions under which disclaimers will be recognized. We are concerned here with the exercise of federal taxing power and state law participates only to the extent recognized in the federal statute or Treasury regulation." Accord: *Fuller* v. *Commissioner*, 37 T.C. 147, 155 (1961); *Estate of Hoenig* v. *Commissioner*, 66 T.C. 471, 477 (1976); *Estate of Halbach* v. *Commissioner*, 71 T.C. 141, 145-146 (1978). Nevertheless, the court further observed that

not sufficient that petitioner's disclaimers were timely and effective under Massachusetts law. Indeed, the two requirements of the Regulation reflect the different concerns of state property law and the federal gift tax law. As the Tax Court correctly explained (Pet. App. A16-A17):

> The Federal gift tax is concerned with control over the disposition of property and with exercises

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"[i]n determining 'reasonable time' and the related issue of when the reasonable time period commences, we perforce, absent a federal statute or regulation defining reasonable time, must look to the law of the states" (480 F.2d at 61).

But in interpreting provisions of the federal estate tax, neither this Court nor the lower courts have felt constrained to follow state law. In *Morgan* v. *Commissioner*, 309 U.S. 78 (1940), the Court held that a power of appointment that was a special power under Wisconsin law was a general power for federal estate tax purposes. The Court explained the interrelationship between federal and state law in the following terms (309 U.S. at 80-81; footnote omitted):

> State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.

Accord: *Burnet* v. *Harmel*, 287 U.S. 103, 110 (1932); *Lyeth* v. *Hoey*, 305 U.S. 188, 194 (1938); *United States* v. *Pelzer*, 312 U.S. 399, 402-403 (1941). See, also, *Rolin* v. *Commissioner*, 588 F.2d 368, 370 (2d Cir. 1978) (timeliness of renunciation of power of appointment determined by federal estate tax regulations); *Hibernia Bank* v. *United States*, 581 F.2d 741 (9th Cir. 1978) (deductibility of administration expense from value of gross estate determined by federal law, regardless of allowability of expense under state law).

> of the right to determine who should enjoy the fruits of ownership of property. * * * State law, by contrast, may respond to concerns such as the balancing of conflicting claims to property * * * and the protection of the rights of creditors and other third parties * * *. While a State court might be willing to accept a renunciation of a non-possessory interest after the passage of considerable time, so long as the interests of third parties have not been harmed, the passage of time is crucial to the scheme of the gift tax. With time, the potential recipient can wait to see if he himself needs the property, or whether he had better let it pass directly to the next generation.

Here, as we have noted, the facts of this case amply illustrate the sharp differences underlying state property rules and the federal gift tax. In executing disclaimers of his remainder interest 33 years after it was created, petitioner has satisfied the state law requirements of timeliness because he has not jeopardized the interests of any competing claimant or creditor. Hence, there would have been no reason for a Massachusetts court to invalidate his disclaimers of his non-possessory interest no matter how late in the day they were made. Petitioner's reliance on the validity of his disclaimers under state law is accordingly irrelevant to the question of timeliness for federal gift tax purposes. On that question, it is highly pertinent that the passage of a 33-year period has permitted petitioner to exercise substantial control over the disposition of his interest in the trust and to determine who

would succeed to that interest upon his disclaimer.[8] It is, we submit, that substantial degree of control over the disposition of an estate that implicates the policies underlying the federal gift tax.

3. Contrary to petitioner's further argument (Br. 12-16), Section 25.2511-1(c) of the Regulations did not codify the common law of disclaimer so as to permit a tax-free disclaimer as long as the disclaimer was effective and timely under state law. In support of this contention, petitioner relies upon *Brown* v. *Routzahn*, 63 F.2d 914 (6th Cir.), cert. denied, 290 U.S. 641 (1933), as "the leading case on the federal tax impact of disclaimers" (Br. 12) and claims that the Regulation adopted the rule of that decision. In *Brown*, the court ruled that a decedent's renunciation of property devised to him by his wife was not a transfer in contemplation of death for estate tax purposes, where the renunciation was made prior to the distribution from his wife's estate. Conversely, in *Hardenbergh* v. *Commissioner*, 198 F.2d 63 (8th Cir.), cert denied, 344 U.S. 836 (1952), it was held that a renunciation by an heir at law of

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[8] Petitioner emphasizes (Br. 7) that there is a "fundamental distinction" between a disclaimer and a voluntary transfer insofar as "in a voluntary transfer the transferor selects the recipients of the property, while in a disclaimer the disclaimant can make no such selection" (*ibid.*). But the distinction makes no difference for purposes of the gift tax, which is imposed on gifts in the "broadest and most comprehensive sense" (H.R. Rep. No. 708, *supra*, at 27-28; S. Rep. No. 665 (Pt. 1), *supra*, at 39). Obviously, petitioner chose to have his interest in the trust pass to the beneficiaries of his disclaimers, rather than choosing to make other disposition of his share of the trust property after succeeding to ownership of it.

an intestate share was a transfer subject to the gift tax because under state law the heir could not refuse to take his share of the estate.

But neither of these cases supports petitioner's broad argument that Section 25.2511-1(c) of the Regulation does no more than require that a disclaimer be effective under state law. The language of the Regulation—with its additional requirement that the disclaimer be made "within a reasonable time after knowledge of the existence of the transfer"—compels the conclusion that the Regulation goes beyond the rules of *Brown* and *Hardenbergh*, neither of which involved the timeliness of a disclaimer.[9] If the draftsmen of Section 25.2511-1(c) intended to codify the rule of *Brown* v. *Routzahn*, there would have been no need to include the "reasonable time" requirement in this gift tax Regulation. To achieve the codification of *Brown* v. *Routzahn*, in accordance with petitioner's theory, the Regulation merely would have provided that a disclaimer effective under state law (which includes timeliness) is not a transfer for federal gift tax purposes.[10] Thus,

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[9] The description of *Brown* v. *Routzahn*, *supra*, in *Commissioner* v. *Vease's Estate*, 314 F.2d 79, 88 (9th Cir. 1963), cited by petitioner (Br. 13), is dictum. There, the court held that the property interest transferred was includable in the decedent's gross estate because the corpus was derived from the decedent's property and not from the grandfather's estate. The case did not turn on the timeliness of a disclaimer.

[10] The amicus brief filed on behalf of the Estate of Halbach set forth several internal documents from the files of the Internal Revenue Service that discuss the treatment of *Brown* v. *Routzahn*, and *Hardenbergh* in Section 25.2511-1(c). None

whatever the extent to which the Regulation may have incorporated common law principles on disclaimer, it is clear that the "reasonable time" requirement under federal tax law and state law are separate and distinct. Indeed, as we have noted, even *Keinath*, the appellate authority favoring petitioner's position (Br. 12), supports this proposition (480 F.2d at 61).

C. Petitioner's 1972 disclaimers were not made "within a reasonable time after knowledge of the existence of the transfer" because the "transfer" occurred upon the establishment of the trust in 1939

1. Petitioner does not challenge the proposition that a 33-year period, or even a 24-year period, is not a "reasonable time" within which to disclaim property and avoid imposition of the gift tax on the transfer. In his view, the period within which he could make a tax-free disclaimer does not begin to run until the death of the surviving life beneficiary when his contingent remainder interest vests. In support of this contention, petitioner claims (Br. 16-19, 20) that he did disclaim "within a reasonable time after knowledge of the existence of the transfer" under the Regulation because the term "transfer" refers to the vesting of the remainder interest after the death of the life beneficiary. Hence, under petitioner's construction of the Regulation, his disclaimers were timely—even though they were made 33 years

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of the statements contained in these documents indicates that the Regulation intended to adopt a rule incorporating state law timeliness requirements for disclaimers. Indeed, to the extent that these documents concern *Brown* and *Hardenbergh*, it is only with respect to the question whether a disclaimant can accept or refuse an inheritance under state property law.

after the establishment of the trust—because they were made prior to "the existence of the transfer," *i.e.*, the vesting of his contingent remainder interest.

But petitioner's argument that the term "transfer" refers to the vesting of his contingent interest is little more than a variation of his erroneous contention that a valid and effective disclaimer under state law should be given controlling recognition for federal gift tax purposes. Under state law, a "transfer" to a contingent remainderman may not occur until it is vested indefeasibly. The federal gift tax statutes, however, do not require such vesting before a tax is imposed. Indeed, as the Tax Court noted (Pet. App. A14-A15), if a person possessing a contingent remainder in a trust were to assign his interest without consideration, the transfer would be subject to the gift tax. *Commissioner* v. *Procter*, 142 F.2d 824, 826-827 (4th Cir.), cert. denied, 323 U.S. 756 (1944). Since the federal gift tax is concerned with control over the disposition of property, and the exercise of the right to determine who should enjoy property (*Burnet* v. *Guggenheim*, 288 U.S. 280, 287 (1933); *Smith* v. *Shaughnessy*, *supra*, 318 U.S. at 181; *Robinette* v. *Helvering*, *supra*, 318 U.S. at 187; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 42-43 (1939)), the state law policies that permit disclaimers of remainder interests within a prescribed period after vesting have no relevance to the federal timeliness requirement that a disclaimer be made "within a reasonable time after knowledge of the existence of the transfer." Indeed, if petitioner were correct that the term "transfer" referred to the vesting of his contingent remainder interest, rather than to the establishment of that interest upon the death of his grandmother in 1939, the

federal timeliness requirement of the Regulation would be rendered superfluous.

The language and structure of the Regulation confirms our submission that the term "transfer" refers to the establishment of the trust. It first provides that the gift tax applies to "all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another * * *." It then states (emphasis added) that "[w]here the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly [to] refuse to accept ownership of property *transferred from a decedent* (whether the *transfer* is effected *by the decedent's will* or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the *transfer*". In this context, the relevant "transfer" is the event that occurs as a result of the death of a decendent. Since the gift tax reaches the gratuitous *inter vivos* transfers of property, property rights or interests, the term "transfer" necessarily refers to the passing of the contingent remainder interest from the decedent (petitioner's grandmother) to petitioner upon her death in 1939 and not to the future vesting of that interest that will occur upon the death of the surviving life beneficiary.[11]

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[11] Petitioner also asserts (Br. 16) that the use of the word "transfer" in the final form of the Regulation, in place of the word "interest" as used in its proposed form ("within a reasonable time after knowledge of the existence of the *interest*" (emphasis added)) is significant. Petitioner suggests that if the word "interest" had been used in the final draft of the

Finally, if any doubt remains on this score, it is dispelled by a body of this Court's decisions in the income, gift, and estate tax area. For example, in income tax cases involving a determination of the date of the transmission of property to a testamentary trust with a remainderman, this Court held that, for purposes of determining the basis of the property to measure subsequent taxable gains or losses on its sale, the remainderman acquired the property upon the death of the testator, rather than upon the vesting of the remainder, even though the subsequent succession was uncertain. *Helvering* v. *Campbell*, 313 U.S. 15, 21 (1941); *Helvering* v. *Gambrill*, 313 U.S. 11, 14 (1941); *Helvering* v. *Reynolds*, 313 U.S. 428 (1941); *Maguire* v. *Commissioner*, 313 U.S. 1 (1941). In these cases, the Court emphasized that it is immaterial that the remainder interest may be conditional at the time of the testator's death, for the remainderman acquired

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Regulation, the decision of the court of appeals would be correct.

But there is no textual support for petitioner's distinction between the terms "transfer" and "interest." The proposed form of Section 25.2511-1(c) likewise contained the word "transfer," in the phrase "the failure to renounce within a reasonable time after learning of the *transfer* * * * will be presumed to constitute an acceptance of the property" (22 Fed. Reg. 53, 58 (1957); emphasis added). It therefore appears that the draftsmen of the Regulation used the words "transfer" and "interest" interchangeably, without drawing the distinction ascribed to them by petitioner. Indeed, the Technical Memorandum accompanying the adoption of the Regulation, which is reproduced in the Appendix at 25a-28a of the amicus brief filed on behalf of the Estate of Halbach, provides no support for petitioner's distinction between the words "transfer" and "interest."

a property interest at such time, even though he did not have the right to its possession.

There is also an analogy in the federal gift tax cases, where it is established that the gift tax is payable on the transfer of property by the donor, *i.e.*, at the time of the execution of the effective instrument, even though a future estate may be contingent upon a possible reversionary interest in the grantor. *Smith* v. *Shaughnessy*, 318 U.S. 176 (1943); *Robinette* v. *Helvering*, *supra*. Since the gift tax is imposed on the transfer measured by the value of the property when it passes from the donor, that is the relevant point in time, even though the identity of the donee may not be known at that time or the future estate may be contingent upon a possible reversionary interest in the donor.

Likewise, in estate tax cases involving charitable remainders after a revocable trust, where there is a possibility of invasion of the trust assets, the courts have held that in valuing a claimed charitable deduction for the remainder passing to charity, the value must be determined from data available at the time of the donor's death, and not at the time the charity actually assumes possession. *Merchants Bank* v. *Commissioner*, 320 U.S. 256 (1943); *Nardi* v. *United States*, 385 F.2d 343 (7th Cir. 1967); *Lincoln Rochester Trust Co.* v. *McGowan*, 217 F.2d 287 (2d Cir. 1954); *Wells Fargo Bank & Union Trust Co.* v. *Commissioner*, 145 F.2d 132 (9th Cir. 1944); Treasury Regulations on Estate Tax, Section 20.2055-2 (26 C.F.R.).

The common thread in all of these cases involving future interests is the uniform view that remainder interests are created either upon the death of the testator, or upon the execution of the *inter vivos*

trust instrument, and not when the remainder interest ripens into actual possession in the hands of the recipient. Section 25.2511-1(c) of the Regulations represents a consistent application of the very same principle in the gift tax area. Accordingly, the "transfer" in this case occurred in 1939 upon the death of petitioner's grandmother when her will took effect and created the remainder interest in her testamentary trust.

D. Petitioner's Disclaimers of His Contingent Remainder Interest Were the Transfers of a Valuable Property Right Upon Which the Gift Tax Was Properly Imposed Under the Regulations

1. Apparently recognizing that the validity of his long-delayed disclaimers under state law was insufficient, and that the pertinent "transfer" under the Regulation was the establishment of the trust in 1939, petitioner alternatively argues (Br. 12) that he had no interest to transfer until the death of the surviving life beneficiary. In support of this claim, petitioner relies upon the statement in *Keinath* that "[a] remainder subject to divestment does not convey or transfer any actual control or current beneficial interest in property to the remainderman. * * * In the instant case the remainderman * * * had really nothing to accept or renounce by way of beneficial ownership or control of the property until he succeeded in outliving the life beneficiary (480 F.2d at 64).

But this argument fails to appreciate the valuable attributes of a remainder interest for purposes of both the gift tax and the law of property. Surely petitioner cannot deny that his grandmother upon her death transferred to him a property interest of considerable value that he did not have prior to her

death and that substantially increased his material wealth. A future interest, contingent or vested, is a property right with a marketable value. *Smith* v. *Shaughnessy, supra,* 318 U.S. at 180; *Chanin* v. *United States,* 393 F.2d 972, 977 (1968); *Commissioner* v. *Marshall,* 125 F.2d 943, 945 (2d Cir. 1942). As we have pointed out (*supra,* page 26), the transfer of such an interest is subject to the gift tax. *Commissioner* v. *Procter, supra.* Moreover, for purposes of porperty law, a contingent remainderman can transfer his interest, gratuitously or for consideration (L. Simes & A. Smith, *The Law of Future Interests* §§ 1857, 1858, 1859 (2d ed. 1956); *Restatement (Second) of Property (Future Interests)* § 163 (1936)), and he can often use his interest to satisfy creditors (L. Simes & A. Smith, *supra,* §§ 1922, 1923; *Restatement (Second) of Trusts, supra,* §§ 147, 162 (1959)). Although the condition precedent to petitioner's possession of the interest (survivorship) would affect the value of his remainder, as taken into account by the Commissioner (Pet. App. A14-A15 n.3), a remainder to a 45-year-old man in an $8 mililon trust, contingent upon surviving a 71-year-old life beneficiary, is obviously a property right of great value. *Smith* v. *Shaughnessy, supra; Chanin* v. *United States, supra; Commissioner* v. *Marshall, supra,* 125 F.2d at 946.

In sum, there is no basis either in the gift tax or in property law for the proposition advanced by petitioner and the *Keinath* court that a person does not have sufficient control over a remainder subject to divestment to warrant imposition of a transfer tax on the disclaimer of such an interest. Such a remainder is a valuable property right that can be valued prior to vesting. The fact that such a remain-

der may be less valuable than an indefeasibly vested remainder does not cast doubt upon the correctness of the conclusion that the disclaimer of either type of remainder is an indirect transfer subject to the gift tax. To limit the gift tax to transfers of vested remainders and exempt those of contingent remainders, as petitioner necessarily argues should be done (Br. 7), would resurrect distinctions in the law of property which this Court long ago put to rest in *Helvering* v. *Hallock*, 309 U.S. 106, 118 (1940). See also *Commissioner* v. *Marshall*, *supra*, 125 F.2d at 945. Indeed, petitioner's argument that he had nothing to disclaim proves too much, for it suggests that his acts of disclaimer were of no import and a meaningless gesture. But that is hardly the case. By his actions, petitioner determined that he would not receive a portion of the remainder interest,[12] but chose instead to have it pass to the natural objects of his bounty. This was the exercise of control over, and an *inter vivos* transfer of, a valuable property interest—a transfer to which the gift tax applies.

2. Contrary to petitioner's further argument (Br. 20-23), the decision below is not inconsistent with Congress' intent that the gift tax complement the estate tax. In support of this contention, petitioner invokes this Court's statement in *Estate of Sanford* v. *Commissioner*, *supra*, 308 U.S. at 44, that "[t]he gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed to-

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[12] Although petitioner renounced his right to 50% of the remainder of his grandmother's trust, he specifically did not renounce his right to 50% of the accumulations of income from the dates of the disclaimers (J.A. 15, 18).

gether." [13] He therefore urges that because a contingent remainder interest (conditioned on survival) would not be subject to the estate tax, its transfer should not be subject to the gift tax.

But the Court's statement in *Estate of Sanford* that the gift tax and the estate tax are in *pari materia* does not mean that the gift tax is limited to those transfers that are also includable in the transferor's gross estate. The statement in *Estate of Sanford* simply means that in enacting the gift tax, Congress sought to impose a levy on gratuitous *inter vivos* transfers that would reduce the transferor's taxable estate. The Court said as much in the sentence immediately following the quoted excerpt: "An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death" (308 U.S. at 44; footnote omitted). Moreover, the Court's later clarification of *Estate of Sanford* in *Smith* v. *Shaughnessy*, *supra*, 318 U.S. at 179, puts the matter beyond doubt. There, the Court stated: "Congress plainly pointed out that 'some' of the 'total gifts subject to gift taxes * * * may be included for estate tax purposes and some not,'" quoting H.R. Rep. No. 708, *supra*, at 45; S. Rep. No. 665 (Pt. 1), *supra*, at 48. Accord: *Cerf* v. *Commissioner*, 141 F.2d 564, 567 (3d Cir. 1944); *Commissioner* v. *Marshall*, *supra*, 125 F.2d at 947-948. Indeed, completed *inter vivos* gifts of property beyond the statutory "contemplation of death" period of Section 2035(a) are not includable

[13] *Estate of Sanford* involved the question whether there was a completed gift when the donor reserved certain powers to change the disposition of the property.

in a decedent's gross estate, but are taxed as gifts. As the Tax Court observed in denying petitioner's "Motion for Reconsideration of Findings and Opinion" (Pet. App. A23; emphasis added):

> [T]he gift tax clearly applies to the gratuitous transfer of valuable property rights notwithstanding the fact that such rights, *like a simple life estate*, might under certain circumstances terminate on or before the death of a donor and therefore escape inclusion in the gross estate.

Finally, petitioner (Br. 22) pursues his argument that the decision below is inconsistent with estate tax principles by analogizing a disclaimer to a special power of appointment. His point is that the holder of a special power has broader control over appointed property than a disclaimant, and yet the exercise (or release) of a special power is not considered a gift, and the appointed property subject to the power is not includable in a holder's gross estate. But petitioner's analogy falls wide of the mark. A disclaimant's control over property more closely resembles a general power of appointment, the release of which is a taxable transfer under Section 2514 of the Code. A disclaimant, unlike the holder of a special power of appointment, can decide to accept the property for himself, in the same manner as the holder of a general power.[14] It is this characteristic of the control exercised by a disclaimant that makes a disclaimer a taxable transfer unless it is made within a reasonable time after knowledge of the existence of the property interests.

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[14] See *Cottrell* v. *Commissioner*, *supra*, 628 F.2d at 1132-1133 (Ross, J., dissenting). See page 20, note 6, *supra*.

See Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. Chi. L. Rev. 316, 357-359 (1979).[15]

3. Moreover, petitioner argues (Br. 25-27) for the first time that it would be "contrary to any reasonable notion of equity" (Br. 26) to apply Section 25.2511-1(c) to his disclaimers of an interest devised to him in 1939 because the Regulation was promulgated in 1958. As petitioner views the matter, the Commissioner abused his discretion under Section 7805(b) of the Code in not applying Section 25.2511-1(c) prospectively only.

But Section 25.2511-1(c) is not being applied retroactively in this case. It applies to all gifts, including disclaimers treated as gifts, made after December 31, 1954. 23 Fed. Reg. 8904 (1958). The transaction upon which the gift tax is imposed in this case occurred in 1972, long after the effective date of the Treasury Regulation. Petitioner is not being taxed on the transfer to him of his remainder interest upon the death of his grandmother in 1939. Rather, the tax is imposed on the relinquishment of

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[15] Rev. Rul. 76-156, 1976-1 Cum. Bull. 292, upon which petitioner relies (Br. 22-23), is distinguishable. There, a disclaimer of an interest in an estate gave rise to a taxable gift because the disclaimant simultaneously exercised a power of appointment granted in the will to appoint the successor in interest. On these unique facts, the Commissioner ruled that the disclaimer served only to disguise the essence of the transaction so that "the act of renunciation, rather than being an act of singular and unambiguous import, becomes uncertain as an indication or sign that the beneficiary has completed and unqualifiedly refused ownership of the property given under the will" (1976-1 Cum. Bull. at 293). Hence, the basis of the Commissioner's ruling was that the disclaimer was not unequivocal, as required by Section 25.2511-1(c) of the Regulations. Unlike this case, however, no question was raised as to the timeliness of the disclaimer.

his control over the disposition of that valuable property interest at the time of the disclaimers in 1972. Thus, petitioner cannot complain that the Commissioner is taxing a transaction that occurred prior to the effective date of the Regulation.[16]

In *Helvering* v. *Reynolds*, 313 U.S. 428 (1941), this Court sustained a Regulation under analogous circumstances. There, the taxpayer received stock from his father's testamentary trust in 1934, and sold the stock in that year. The trust acquired the stock in 1918, upon the death of the taxpayer's father. Pursuant to the applicable Treasury Regulation under the Revenue Act of 1934, the taxpayer was required to assume the 1918 basis, even though his interest in the trust was a contingent remainder. The Court upheld the application of the Treasury Regulation to the year 1934, even though it was not promulgated until 1935 (313 U.S. at 430-434). As the Court stated, "[t]he fact that the regulation was

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[16] The Regulation is not retroactive in another respect, because, until its promulgation, there were no published rules by the Treasury concerning the gift tax consequences of disclaimers made after the date of the creation of a property interest. In these circumstances, the Regulation did not change settled law but became the first controlling rule, much like a definitive judicial decision. As the Court stated in *Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936):

> The contention that the new regulation is retroactive is without merit. Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule in respect of the situation presented. It pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute. * * * It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.

not promulgated until after the transactions in question had been consummated is immaterial. * * * To hold that [the taxpayer] had a vested interest in a hypothetical decision in his favor prior to the advent of the regulations, would introduce into the scheme of the Revenue Acts refined notions of statutory construction which would, to say the least, impair an important administrative responsibility in the tax collecting process" (*id.* at 433). Since the transaction at issue here occurred in 1972, long after the promulgation of the Regulation, this case would appear to follow *a fortiori* from *Helvering* v. *Reynolds*, *supra*.

It is no answer to assert, as do petitioner (Br. 26) and *amici*,[17] that the effect of the Regulation is retroactive insofar as "[h]olders of [the] pre-1958 interests * * * have been arbitrarily, capriciously and suddenly deprived of their existing right to refuse to accept ownership of property without the imposition of a tax." In petitioner's view, the Regulation was defective because it "made no provision for any grace period following its enactment [*sic*] within which 'transfers' made by instruments predating 1958 could effectively be disclaimed." Put another way, petitioner claims that the Regulation foreclosed him at the outset because in 1958 he had already held his remainder interest for 19 years, or ten years after attaining his majority.

To begin with, petitioner never had a right to disclaim his remainder interest free of gift tax. That tax is imposed by provisions of the Code enacted in 1932—seven years before his grandmother's death. The Regulation merely defines a narrow exception to the application of the comprehensive language of those

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[17] See Brief of Estate of Halbach, at 17.

Code provisions (see pages 11-14, *supra*). Thus, the Regulation did not deprive petitioner of any pre-existing right.[18] Moreover, even on the assumption that a grace period would have been appropriate upon the promulgation of the Regulation, the facts of this case are particularly ill-suited for petitioner to advance such a claim. Here, petitioner did not disclaim his interest until 1972—14 years after the promulgation of

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[18] Even if the Regulation could be considered to have been applied retroactively to the date petitioner acquired his interest in his grandmother's trust in 1939, the Commissioner did not abuse his discretion under Section 7805(b). This Court has ruled on several occasions that the Commissioner has the power to correct mistakes of law retroactively in the application of the tax laws to particular transactions. *Dixon* v. *United States*, 381 U.S. 68, 72 (1965); *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 183-184 (1957); *Helvering* v. *Reynolds*, *supra*; *Manhattan Co.* v. *Commissioner*, *supra*. In *Dixon*, the taxpayer had relied on the Commissioner's acquiescence in a Tax Court decision that was withdrawn after the transaction in question occurred. The Court stated (381 U.S. at 79-80; footnote omitted): "Insofar as petitioners' arguments question the policy of empowering the Commissioner to correct mistakes of law retroactively when a taxpayer acts to his detriment in reliance upon the Commissioner's acquiescence in an erroneous Tax Court decision, their arguments are more appropriately addressed to Congress."

Here, unlike *Dixon*, petitioner cannot justifiably claim a detrimental reliance on any public or private position of the Commissioner to the effect that a disclaimer timely under state law is not a transfer subject to the gift tax. And, even if petitioner could somehow claim reliance on such a position, *Dixon* teaches that such reliance does not preclude the Commissioner from correcting a mistake of law and applying the new rule retroactively. Accordingly, even if the Regulation changed settled law or a prior policy of the Commissioner, there would be no bar to the application of Section 25.2511-1(c) to petitioner's disclaimers.

the Regulation in question. Hence, petitioner's disclaimers were neither made within a reasonable time after learning of his interest nor within the bounds of any reasonable grace period one might hypothesize.

4. Finally, petitioner argues (Br. 24-25) that it would be inequitable to subject his disclaimers to the gift tax because it would give impermissible retroactive effect to the new disclaimer statute, Section 2518 of the Code, which was enacted by Congress in Section 2009(b)(1) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1893.[19] Pursuant to this statute, which is effective for the disclaimer of any interest created after December 31, 1976, a "qualified disclaimer" must be made within nine months after the later of the date on which the transfer creating the interest in the disclaimant is made, or the day on which the disclaimant attains age 21 (Section 2518(b)(2) and 2518(b)(2)(B)). In so contending, petitioner subscribes to the observation of the dissenting judge in the court below that "[t]he Congress, in the Tax Reform Act of 1976, acted to override the *Keinath* rule, but only prospectively. The effect of the decision of the majority is to give to the 1976 Amendments the retrospective effect which the Congress expressly rejected" (Pet. App. A6).

But the enactment of Section 2518, which was a legislative attempt to establish a uniform federal standard for disclaimers, has no impact whatsoever upon taxable years prior to its effective date. In adding this provision to the Code, Congress was entirely neutral as to the correctness of the *Keinath* court's exclusive reliance on effectiveness of a disclaimer under state law and to the application of the federal timeliness requirement of Section 25.2511-1(c) of the

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[19] See also Brief of Mayer, Brown & Platt, at 2-3; Brief of Adelaide C. Griswold, *et al.*, at 14-17.

Regulations. The pertinent House committee report bears this out. After noting the existence of the *Keinath* decision and the "reasonable" time requirement of the Regulation, the House committee stated that Congress simply "believe[d] that definitive rules concerning disclaimers should be provided for estate and gift tax purposes to achieve uniform treatment. In addition, [Congress] believe[d] that a uniform standard should be provided for determining the time within which a disclaimer must be made" (H.R. Rep. No. 94-1380, 94th Cong., 2d Sess. 66-67 (1976); footnote omitted). Hence, nothing in the committee report concerning the new statute or its effective date can attribute to Congress a purpose to exempt from the gift tax a belated disclaimer of the type at issue here prior to January 1, 1977, without regard to whether it was "made within a reasonable time after knowledge of the existence of the transfer." Indeed, in *Knetsch* v. *United States*, 364 U.S. 361, 367-370 (1960), this Court rejected much the same argument that a prospective statute demonstrated Congress' intent to allow claimed tax consequences for prior years. It is the "reasonable time" requirement of Section 25.2511-1(c) of the Regulations, and not Section 2518, that is the basis of our submission that the decision below correctly held that petitioner's disclaimers were taxable gifts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1981

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2501 (1970 ed.). IMPOSITION OF TAX.

(a) *Taxable Transfers.*

(1) *General rule.*—For the first calendar quarter of calendar year 1971 and each calendar quarter thereafter a tax, computed as provided in section 2502, is hereby imposed on the transfer of property by gift during such calendar quarter by any individual resident or nonresident.

* * * * *

SEC. 2511. TRANSFERS IN GENERAL.

(a) *Scope.* Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

* * * * *

Treasury Regulations on Gift Tax (26 C.F.R.):

§ 25.2511-1 *Transfers in general.*

* * * * *

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of

the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [*sic*] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was de-

vised to A under the decedent's will (which also provided that all lapsed legacies and devices shall go to B, the residuary beneficiary), and under the local law A could refuse to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. However, if a decedent who owned Greenacre died intestate with C and D as his only heirs, and under local law the heir of an intestate cannot, by refusal to accept, prevent himself from becoming an owner of intestate property, any gratuitous disposition by C (by whatever term it is known) whereby he gives up his ownership of a portion of Greenacre and D acquires the whole thereof constitutes the making of a gift by C to D.

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No. 80-1614

In the Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE F. JEWETT, JR.
and
LUCILLE M. JEWETT,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

I. THE COMMISSIONER'S ATTEMPTED REPHRASING DOES NOT RESOLVE THE INCONSISTENCY BETWEEN HIS ARGUMENT AND THE REGULATION'S PLAIN LANGUAGE.

The keystone of the Commissioner's interpretation of Treasury Regulation §25.2511-1(c) is his contention that "transfer...of ownership of a decedent's property" to the disclaimant means the *creation* of a contingent remainder interest under a trust rather than the actual *transfer* of the trust property upon the elimination of the contingency. As if to mask the inconsistency between his argument and the plain

meaning of the Regulation, discussed in Petitioners' Brief at 19, the Commissioner repeatedly and consistently rephrases the text of the Regulation to beg the issue. For example, at Resp. Br. 7 he states that the Regulation requires that the disclaimer be made "within a reasonable time after a person learns of his rights to the property"; at 14 he uses the identical language and then varies that language with "after the person becomes aware of his interest in the property"; at 15 it is "after he learned of the existence of his remainder" and "after petitioner learned of his remainder interest"; at 16 he uses three variations: "learns of his rights to the property", "learns of the existence of his interest" and "learns of his right to a property interest." *See also* Resp. Br. at 17, 18, 19.

The Commissioner's persistent rephrasing of the text calls for an equally persistent reminder that it is the language of the Regulation, not a colored paraphrase, which is at issue. Treasury Regulation §25.2511-1(c) requires a disclaimer to be made "within a reasonable time after knowledge of the existence of the *transfer*," (emphasis added) and the term "transfer" relates in context to "ownership of property transferred from a decedent" and to "a transfer...of ownership of a decedent's property." Knowledge of "the transfer" means just that—knowledge of a *transfer to the disclaimant of ownership*, not mere "knowledge of the existence of his interest" or "learning of his rights". *See* Pet. Br. at 19.

The Commissioner's careful choice of phrase cannot gloss over the fundamental conflict between his argument and the plain language of the Regulation.

II. Contrary to the Commissioner's Assertion, Jewett Exercised No Control Over the Subsequent Disposition of the Contingent Remainder.

In his statement of facts, the Commissioner erroneously states that Jewett "disclaimed his interest in the trust *in favor of his issue*" (Resp. Br. at 3) (Emphasis added). Later, he

refers to "the beneficiaries of his disclaimers" (*id.* at 23 n.8), suggesting that Jewett's disclaimers affirmatively directed his interest to certain "beneficiaries".

In fact, Jewett's disclaimers were silent as to the disposition of the remainder interest. (J. App. 15-18) Jewett did not direct the interest to his issue, to any particular beneficiaries or to anyone; he merely refused to accept a potential bequest. Jewett's disclaimers had precisely the same consequences under the trust as his death prior to the life beneficiary's would have.

Disposition of the trust property, upon the death of the last life beneficiary, depends upon the Testatrix's Will and applicable state law. Indeed the trust property may not go to Jewett's issue at all. Under the Will, the ultimate recipients could be Jewett's children, their issue, their uncles and aunts, their cousins, or various more distant relatives. (J. App. 9-11) Neither Jewett nor anyone else can determine those ultimate recipients until the death of the remaining life beneficiary. *See* Pet. Br. at 7 n.3.

III. The Commissioner's Analogy of Jewett's Disclaimers to the Exercise of a General Power of Appointment Is Inapt.

As Petitioner has argued (Pet. Br. at 22-23), if the exercise of a limited power of appointment is not a taxable transfer, then *a fortiori* a disclaimer, involving a lesser degree of control, should not be taxable. The Commissioner contends that this argument "falls wide of the mark", and that "[a] disclaimant's control over property more closely resembles a [taxable] general power of appointment," because a disclaimant, "unlike the holder of a special power of appointment, can decide to accept the property for himself, in the same manner as the holder of a general power" (Resp. Br. at 34).

It is the Commissioner's analogy which fails. Jewett's ability to accept the property for himself was *contingent*. It required him to survive his mother's death. Thus the Commissioner's analogy more accurately would be to a person who might in

the future have a general power of appointment, but only if he were to survive his mother. The release of such a contingent power would *not* be taxable. Internal Revenue Code §2041, 26 U.S.C. §2041.

IV. The Commissioner Misstates the Issue of Retroactivity.

The Commissioner argues that there is no problem of retroactivity in his interpretation of Treasury Regulation §25.2511-1 because Jewett disclaimed long after the promulgation of the Regulation and because in any event he never had a right to disclaim his remainder interest free of tax. (Resp. Br. at 35-36, 37-38). Those contentions are disingenuous.

The Commissioner agrees that section 25.2511-1(c) "applies to all gifts, including disclaimers treated as gifts, made after December 31, 1954." (Resp. Br. at 35). If the Commissioner's interpretation of the Regulation is valid, a disclaimer by Jewett on January 1, 1955 would have been taxable. Yet the law prior to the 1958 promulgation of the Regulation was clear: under *Brown* v. *Routzahn*, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933), Jewett could disclaim free of tax. This is not a case in which the Regulation filled a void in the preexisting law.[1] Rather the rule of *Brown* v. *Routzahn* was clear and unequivocal and the Commissioner's interpretation would have reversed that rule retroactively.

If the Commissioner's interpretation of the Regulation is correct, the Regulation worked a fundamental change in the law, retroactively, without warning and without a "grace period" within which holders of preexisting interests might disclaim.

To permit such an unannounced retroactive change would be fundamentally unfair. Rather than ascribe such an illogical and inequitable meaning to the Regulation, the Commissioner's interpretation should be rejected.

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[1] The Commissioner apparently ignores *Brown* v. *Routzahn*, *supra*, when he asserts that "the Regulation did not change settled law but became the first controlling rule, much like a definitive judicial decision." Resp. Br. 36 n.16.

V. Although Federal Tax Standards May Differ From State Standards There Is No Requirement That They Must Differ.

The Commissioner persists in misstating Jewett's position and the position of the Eighth Circuit in *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), and *Cottrell* v. *Commissioner*, 628 F.2d 1127 (8th Cir. 1980), by asserting that Jewett contends that the state rule for timeliness of disclaimer is controlling for purposes of the federal tax law. (Resp. Br. at 20-21, 26).

Petitioners do not contend that state law is controlling on the issue of timeliness. Petitioners, like the Eighth Circuit in *Keinath*, recognize that for federal tax purposes "we are not conclusively bound by the state law," but they also recognize that there *is* no federal law of disclaimer, and that therefore "state law . . . is the only field to probe for legal decisions and discussions on the phrase 'reasonable time' as used in the context of making valid disclaimers." 480 F.2d at 61-62.

Petitioners admit that federal tax law standards *can* differ from state law standards. However, the Commissioner appears to be arguing that because they *can* differ the federal standards *must* differ, a position which is neither logically compelling nor factually reasonable when there is no existing federal law of disclaimer and when all 34 states having statutes in point, and other states by decisional law, have expressly adopted the standard advanced by Petitioners and the Eighth Circuit (*see* Pet. Br. at 16-19).

VI. Jewett's Intent Is Irrelevant.

The Commissioner acknowledges that Jewett's intent in executing the disclaimers is irrelevant to this case. (Resp. Br. at 12). However, he repeatedly suggests, directly or by innuendo, that Jewett's intent in executing the disclaimers should color this Court's analysis of the law.

Hence, the Commissioner points out that Jewett's delay was "purposeful" (Resp. Br. at 15), that when he disclaimed Jewett was 45 years old, "an age that was actuarially beyond his mid-life" (*id.* at 18), that he "acted with some degree of caution and with seeming reluctance" (*id.*), that "he presumably had determined" that he did not need the remainder interest (*id.*), and that he "appears to be a person of substantial wealth" (*id.* at 18 n.5). The Commissioner quotes the Tax Court's gratuitous comment that the trust property would pass "to the natural objects of [Jewett's] bounty" (*id.* at 19) and he later adopts that comment as his own (*id.* at 32). Surely the Commissioner's position cannot be that the disclaimers would be tax free if Jewett had been ignorant of the law, or reckless, or impecunious, or poorly advised, or in his twenties, or estranged from the next contingent beneficiary.

Jewett's intent is irrelevant. The Commissioner's speculation as to Jewett's intent adds nothing to the resolution of this case.

VII. The IRS Technical Memorandum Dated October 1, 1958 Documents the Drafters' Intent To Codify Existing Law.

In their Brief Petitioners argued that Treasury Regulation §25.2511-1(c) was a codification of the existing common law of disclaimer as expounded particularly in two pre-1958 cases, *Brown* v. *Routzahn*, *supra*, and *Hardenbergh* v. *Commissioner*, 198 F.2d 63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952). (*See* Pet. Br. at 12-16). That preexisting common law provided, generally, that a disclaimer valid and timely under state law would not be taxable as a gift unless under state law title immediately vested in the would-be disclaimant without an option of acceptance or rejection. *Id.*

Subsequent to the filing of Petitioners' Brief, an IRS Technical Memorandum was published which had been pre-

pared by the drafters of Treasury Regulation §25.2511.1 to explain to the Treasury Department the final version of that Regulation. Taxation with Representation Fund, XIII *Tax Notes*, 203 (July 27, 1981). (A copy of the Technical Memorandum, dated October 1, 1958, is attached hereto as Appendix A). That memorandum expressly describes the intent of the drafters of the Regulation at issue herein. It was called to this Court's attention by the Brief of an Amicus Curiae filed on behalf of the Estate of Helen W. Halbach, which had obtained the memorandum under the Freedom of Information Act. The Commissioner in his Brief dismissed the memorandum with one sentence at the end of a footnote (Resp. Br. at 25 n.10).[8] That memorandum, however, warrants more detailed attention.

The purpose of an IRS Technical Memorandum is to provide "a detailed explanation of the regulations" and it may "summarize the regulations, evaluate possible problems in interpreting the statute or prior regulations, provide background information, or explain the reasons for the approaches taken in specific provisions of the regulations." *Taxation With Representation Fund* v. *IRS*, 646 F.2d 666, 674 (D.C. Cir. 1981). Technical Memoranda "may tell more about a regulation than the regulation itself." *Id.* at 683.

In this case the Technical Memorandum states that Treasury Regulation §25.2511-1(c) was expressly intended to codify existing law as interpreted in *Brown* v. *Routzahn*, *supra*, and *Hardenbergh* v. *Commissioner*, *supra:*

> Paragraph (c) of section 25.2511-1, . . . discusses certain acts which constitute the making of a gift. Among the acts discussed is the renunciation, or attempted renunciation, of property, or a property interest, passing from a

[8] The Commissioner in fact later relied on the Memorandum in another footnote. (Resp. Br. at 27 n.11).

> decedent. *In what was intended to be the application of the rules in Brown* v. *Routzahn* (1933) 63 F.2d 914, *cert. denied* 290 U.S. 641, *and Hardenbergh* v. *Commissioner* (1952) 198 F.2d 63, *cert. denied* 344 U.S. 836, it was stated that where title to the property did not vest in the beneficiary or heir immediately upon the decedent's death, the renunciation of the property did not constitute the making of a gift, but that where title vested in the beneficiary or heir immediately upon the decedent's death, the act of the beneficiary or heir in giving up what passed to him from the decedent constituted the making of a gift. . . . Protests on these provisions were received. After reviewing these protests, we have reconsidered our position and now believe that the proper distinction between these two court cases turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property which passed from the decedent. Accordingly, we have revised paragraph (c) of Section 25.2511-1 to reflect this change of position. . . .

A-2–A-3 (emphasis added).

Agency memoranda contemporaneously interpreting or explaining the agency's own regulations are given substantial weight in the interpretation of ambiguous language in the regulations. *See Legal Aid Soc. of Alameda County* v. *Brennan*, 608 F.2d 1319, 1341 n.43 (9th Cir. 1979); *Charles* v. *Krauss Co., Ltd.*, 572 F.2d 544, 547-48 (5th Cir. 1978); *Phillips Petroleum Co.* v. *Department of Energy*, 449 F. Supp. 760, 784 (D. Del. 1978), *aff'd sub nom. Standard Oil Co.* v. *Department of Energy*, 596 F.2d 1029 (Em. App. 1978); *Borelli* v. *Reconstruction Finance Corp.*, 196 F.2d 730, 736-37 (Em. App. 1952). That is true even when the memorandum is not composed or written by the agency decisionmaker. "Courts consider contemporaneous expressions of opinion by low-ranking officials highly relevant and material evidence of

the general understanding of ambiguous regulatory provisions." *Phillips Petroleum Co.* v. *DOE, supra,* 449 F. Supp. at 784. IRS Technical Memoranda, moreover, are treated internally by the IRS as part of the IRS's own internal agency authority, and often are used as *de facto* substantive law by the employees of the IRS. *Taxation With Representation Fund* v. *IRS, supra,* 485 F. Supp. at 267.

The Petitioners do not contend that the Regulation is ambiguous. Rather, the Regulation, on its face, indicates that Jewett's disclaimers were not taxable. However, if this Court determines that the regulatory language is in any way ambiguous, the Technical Memorandum would resolve that ambiguity authoritatively. It represents the express contemporaneous understanding of the draftsmen, and it squarely supports the Petitioners' position.[3]

Conclusion

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 9, 1980 should be reversed and judgment entered for Petitioners.

Respectfully submitted,

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[3] Since the publication of the Technical Memorandum, secondary authorities have already noted that it severely undercuts the Commissioner's position in this case. *E.g.*, Research Institute of America, Inc., *Federal Tax Coordinator 2d*, 27 *Weekly Alert* 223 (July 30, 1981); Taxation with Representation Fund, XIII *Tax Notes* 203 (July 27, 1981).

APPENDIX

The following is a Memorandum dated October 1, 1958 as published in Taxation with Representation Fund, XIII *Tax Notes*, 203 (July 27, 1981).

October 1, 1958

MEMORANDUM FOR: Honorable Robert B. Anderson
Secretary of the Treasury

SUBJECT: Proposed Treasury decision—
Regulations under provisions of the Internal Revenue Code of 1954 relating to the gift tax.

[See T.D. 6334, 1958-2 C.B. 627]

There is transmitted herewith, with the recommendation that it be approved, a proposed Treasury decision which would issue the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B of the Internal Revenue Code of 1954. The regulations contained in the proposed Treasury decision are applicable to gifts made on or after January 1, 1955.

The proposed Treasury decision is substantially the same as that published as notice of proposed rule making in the Federal Register of January 3, 1957 (22 F.R. 53). In those areas where the Estate Tax Regulations and the Gift Tax regulations interpret similar provisions of law, the Gift Tax Regulations have been conformed to agree with the positions taken in the Estate Tax Regulations. Among the provisions of law pertaining to the estate tax and the gift tax which are similar are those relating to valuation of property, powers of appointment, charitable deductions, marital deductions, and certain administrative provisions relating to the time and place for filing returns and paying tax, the keeping of records, etc. In the case of the Estate Tax Regulations certain material

found in the notice of proposed rule making was removed from the final regulations because of doubt as to the accuracy of the material, and certain subjects were not treated (or, if treated at all, were referred to in general terms only) because of lack of agreement as to the precise rule to be followed. Where such material and subjects also come within the scope of the Gift Tax Regulations, the same action was taken as in the case of the Estate Tax Regulations. Among these subjects are transfers for less than full consideration (including property settlements and transfers for support which do not come under section 2516), and the valuation of shares in open-end investment companies. A few significant changes were made in the portions of the proposed regulations which pertain to subjects peculiar to the gift tax. These changes may be summarized as follows:

Disclaimers.

Paragraph (c) of section 25:2511-1, as set forth in the notice, discusses certain acts which constitute the making of a gift. Among the acts discussed is the renunciation, or attempted renunciation, of property, or a property interest, passing from a decedent. In what was intended to be the application of the rules in *Brown* v. *Routzahn* (1933) 63 F.2d 914, cert. denied 290 U.S. 641, and *Hardenbergh* v. *Commissioner* (1952) 198 F.2d 63, cert. denied 344 U.S. 836, it was stated that where title to the property did not vest in the beneficiary or heir immediately upon the decedent's death, the renunciation of the property did not constitute the making of a gift, but that where title vested in the beneficiary or heir immediately upon the decedent's death, the act of the beneficiary or heir in giving up what passed to him from the decedent constituted the making of a gift. Furthermore, in the notice the position was taken in paragraph (c) that a partial renunciation of property could not be made. Protests on these provisions were received. After reviewing these protests, we have reconsidered our position and now believe that the proper distinction between these

two court cases turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property which passed from the decedent. Accordingly, we have revised paragraph (c) of section 25.2511-1 to reflect this change of position. Also, we have abandoned the position that a partial renunciation cannot be made, and paragraph (c) has been further changed to recognize a partial renunciation where it is effective, as such, under local law.

Annual exclusions for gifts to minors.

In general, section 2503(b) authorizes an annual exclusion of $3,000 for gifts of present as against future interests. Section 2503(c) then provides (in part) that a gift of property to a person under 21 years of age will not be considered a gift of a future interest in property if the property "may be expended . . . for the benefit of" the donee before his attaining the age of 21 years. In the notice of proposed rule making, it was indicated by way of example that the above-quoted condition of the section might be satisfied even though the trustee or custodian of the property did not have the unrestricted discretion to determine the amount and purpose of any expenditure for the donee. This example has been modified in order to point out that the trustee or custodian must have unrestricted discretion in these respects.

Section 2503(c) further provides that in the event the donee dies before attaining the age of 21 years, the property must be payable to his estate or "as he may appoint under a general power of appointment." The position is taken in the notice that the power of appointment must be validly exercisable by the donee under the applicable local law (taking into account the fact that the donee is under 21 years of age). It is our opinion that Congress did not intend that the condition of the section relating to the power of appointment be satisfied by setting up a power of appointment in the donee that could never be used. Certainly, a literal reading of the statute sup-

ports such position, i.e., if the power was not exercisable, the property would not "be payable...as [the donee] may appoint." Furthermore, it is our understanding that the purpose of section 2503 is to allow the annual exclusion for gifts to minors when they substantially own the transferred property (because gifts to adults receive such treatment). The minors do not substantially own the transferred property if, when they die under 21 years of age, the donor can control the disposition of the property (as he can if the minor is given a nonexercisable power, with gift over in default of appointment).

Only a few protests were received which objected to the position taken in the notice regarding the power of appointment. Such protests contain two main arguments. First, it is contended that the position taken in the notice is inconsistent with Rev. Rul. 55-518, C.B. 1955-2,384, which would include in a decedent's gross estate under section 2041, the value of property over which the decedent "has at the time of his death a general power of appointment" even though such power is not exercisable because of the decedent's incompetency. It is our thought that the position in the notice is proper and that it can be reconciled with the ruling, since the language contained in section 2503(c) is different from that contained in section 2041 (see above-quoted material). However, if it should be determined that the position taken in the notice is inconsistent with Rev. Rul. 55-518, reconsideration could be given at a later time to the position in the revenue ruling, taking into account other related problems in the field of estate taxation.

Secondly, it is contended that Congress knew that persons under the age of 21 cannot generally exercise powers of appointment and that the inclusion of the power of appointment provision was intended to cover cases where minors were given nonexercisable powers. This argument does not seem convincing to us, especially since in some States powers of appointment can be exercised by persons under 21 years of age (e.g., some States allow a person 18 years of age to exercise powers of appointment).

Commissioner

NO. 80-1614

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

GEORGE F. JEWETT, JR., *et ux.*,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ADELAIDE C. GRISWOLD, AMORY HOUGHTON, JR., JAMES R. HOUGHTON, ELEANOR C. HALLENBECK, LAURA H. BEER, ELEANOR H. COLE AND THE ESTATE OF AMORY HOUGHTON, AS *AMICI CURIAE*

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Interest of the Amici Curiae*

This brief is submitted on behalf of Adelaide C. Griswold, Amory Houghton, Jr., James R. Houghton, Eleanor C. Hallenbeck, Laura H. Beer, Eleanor H. Cole and the Estate of Amory Houghton, as *Amici Curiae*, urging reversal of the decision of the United States Court of Appeals for the Ninth Circuit in the instant case.

The *Amici* have a substantial interest in the instant case in that six of them have cases now pending in the United States Tax Court which involve, *inter alia*, the same question of law as is presented in the instant case. The names and Tax Court Docket Numbers of the cases are as follows: Adelaide C. Griswold (Docket No. 12876-79), James R. Houghton (Docket No. 12878-79), Amory Houghton, Jr. (Docket No. 12880-79), Laura H. Beer (Docket No. 12877-79), Eleanor C. Hallenbeck (Docket No. 12879-79) and Eleanor H. Cole (Docket No. 12891-79). Hearings have been held before the Honorable Darrell D. Wiles in four of the cases, and the parties have filed post trial briefs. Judge Wiles has not yet rendered a decision. Hearings have not yet been held in the cases of Laura H. Beer and Eleanor H. Cole.

The remaining *Amicus*, the Estate of Amory Houghton, also faces litigation involving the same question of law. Amory Houghton, prior to his death, filed a claim for refund with the Internal Revenue Service (the "Service"), and the Service has denied the claim. The Estate of Amory Houghton intends to litigate the denial of the claim.

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* Letters of the Petitioner and the Respondent giving their consent to the filing of this brief have been filed with the Clerk of this Court.

The *Amici* (with the exception of Amory Houghton and Eleanor H. Cole) were contingent remaindermen of a trust created under the Will of their grandfather, Alanson B. Houghton, who died on September 16, 1941. The income from the trust (the "1941 Trust") was payable to their aunt, Elisabeth Houghton ("Elisabeth"), during her life. Upon her death, the income was payable to her issue, *per stirpes,* or, if none, to the then living grandchildren of Alanson B. Houghton and to the issue of his deceased grandchildren, *per stirpes.* Upon the the death of the measuring life, Laura H. Beer (one of the above-named *Amici*), the 1941 Trust is to terminate and the corpus is to be distributed to the then living issue of Elisabeth, or, if none, to the then living grandchildren of Alanson B. Houghton and to the issue of his deceased grandchildren, *per stirpes.*

In September of 1941, when the 1941 Trust was created, Elisabeth was only 32 years of age and in good health; whereas the *Amici* were the following ages: Adelaide C. Griswold—17 years of age; Amory Houghton, Jr.—15 years of age; Eleanor C. Hallenbeck—9 years of age; James R. Houghton—5 years of age; and Laura H. Beer—3 years of age. Elisabeth died without issue on March 2, 1974. Shortly after her death, the *Amici* disclaimed their contingent remainder interests in the 1941 Trust *in toto.*

The remaining two *Amici,* Amory Houghton and Eleanor H. Cole, are the children of Alanson B. Houghton. They were contingent remaindermen of an *inter vivos* trust that Alanson B. Houghton created on December 10, 1934. The income from the trust (the "1934 Trust") was payable to Elisabeth (who was the younger sister of these two *Amici*) during her life. Upon Elisabeth's death, the income was payable to her then living issue, or, if none, to the then living issue of Alanson B. Houghton in equal shares *per stirpes.* Upon the death of the measuring life, Eleanor

C. Hallenbeck (one of the above-named *Amici*), the 1934 Trust is to terminate, and the corpus is to be distributed to the then living issue of Elisabeth, or, if none, to the then living issue of Alanson B. Houghton in equal shares *per stirpes*.

At the time of the creation of the 1934 Trust in December of 1934, Elisabeth was only 26 years of age and in good health; whereas Amory Houghton was 35 years of age and Eleanor H. Cole was 38 years of age. As noted, Elisabeth died without issue on March 2, 1974. Shortly after her death, Amory Houghton and Eleanor H. Cole both disclaimed their contingent remainder interests in the 1934 Trust *in toto*.

The Service has taken the position that the disclaimers by the *Amici* resulted in taxable transfers for Federal gift tax purposes.

Under Treasury Regulation § 25.2511-1(c) (the "Treasury Regulation") a disclaimer will not result in a taxable transfer for Federal gift tax purposes if it is made within a reasonable time after the disclaimant first acquires "knowledge of the existence of the transfer". One of the positions taken by the *Amici* in their cases is that the "transfer", for this purpose, occurred upon the death of Elisabeth, the life income beneficiary, in March of 1974, and not upon the creation of the 1941 Trust in September of 1941 or upon the creation of the 1934 Trust in December of 1934. Accordingly, since the *Amici* disclaimed their contingent remainder interests shortly after the "transfer", their disclaimers were not taxable transfers. This is essentially the same argument that the Petitioner in the instant case is making. Accordingly, the *Amici* have a substantial interest in this Court's review of the instant case.

The *Amici's* cases are distinguishable from the instant case in a number of important respects. The distinguish-

ing features, however, serve only to accentuate the inequity of the Service's position that, for Federal gift tax purposes, the timeliness of a disclaimer of a contingent remainder interest in a trust is measured from the creation of the trust rather than from the death of the life beneficiary.

For example, the *Amici* allege that they did not have any knowledge (i.e., either actual knowledge or reason to know) of their remainder interests in the trusts at the time of the creation of the trusts in 1934 and 1941. Five of the seven *Amici* did not learn of their interests until shortly *after* the death of Elisabeth, the life beneficiary. Upon acquiring this knowledge, they all promptly disclaimed their interests *in toto*. The remaining two *Amici* did not learn of their specific interests until shortly before the death of Elisabeth, and, promptly after the death of Elisabeth, they also disclaimed their interests *in toto*.

In the cases now pending in the Tax Court, the Service acknowledges that, under the Treasury Regulation, the period of time during which the disclaimer must occur does not commence to run until the disclaiming party has "*knowledge of* the existence of the transfer". The Service contends, however, that "knowledge" for this purpose does not mean actual knowledge but rather mere reason to know. It then argues that, if the *Amici* did not for a period of many years prior to disclaiming their interests have actual knowledge of their contingent remainder interests, they had reason to know of them. The Tax Court, accordingly, now has before it the question of law as to whether, within the meaning of the Treasury Regulation, the term "knowledge" means actual knowledge or mere reason to know. In addition, it has before it the question of fact as to when the *Amici* first acquired that requisite state of knowledge.

A second distinguishing feature between the *Amici's* cases and the instant case relates to the nature and extent

of the contingencies to which the remainder interests were subject. In the instant case, the Petitioner, in order to receive a possessory interest in the trust, had only to survive his grandfather, father and mother, who were the life beneficiaries. In addition, the specific share of the trust that he would receive was dependent upon the number of his siblings who also survived the life beneficiaries or who had issue who survived the life beneficiaries.

In contrast, the remainder interests of the *Amici* were all subject to far greater contingencies, the cumulative effect of which was to render it highly unlikely, as of the time that the trusts were created, that the *Amici* would ever receive any possessory interest whatsoever in the trusts. Moreover, the contingencies were such that even if the remainder interests did ultimately become possessory, the amount or value of the possessory interests was almost totally conjectural.

The *Amici* are filing this brief in order to insure that this Court will be cognizant of the far reaching effect that its decision in the instant case will have and of the even more harsh and inequitable results that could flow to other taxpayers if this Court does not reverse the decision of the Ninth Circuit herein.

The *Amici* advance the following specific arguments in support of their position that the decision of the Ninth Circuit in the instant case should be reversed:

ARGUMENT

I.

The Petitioner satisfied the condition of Treasury Regulation § 25.2511-1(c) because the date of the "transfer" occurs upon the death of the last surviving income beneficiary, not upon the creation of the trust.

The interpretation of the Treasury Regulation by the Ninth Circuit places an unfair and unreasonable burden on a taxpayer wishing to disclaim a remainder interest where the remainder interest is subject to contingencies similar to those faced by the Petitioner. The effect of such an interpretation is to force the taxpayer to disclaim a property interest at a time when he does not know either the amount or value of the interest he is disclaiming or whether he will ever receive such interest. Obviously, the policy of the Federal gift tax law is not, and should not be, to require taxpayers to disclaim a remainder interest prior to the time that they know what they are disclaiming.

The *Amici,* like the Petitioner, are also faced with this unreasonable and erroneous interpretation of the Treasury Regulation. An examination of the contingencies that the *Amici* faced upon the creation of their trust interests, both as to their remainder interests in income and as to their remainder interests in corpus, readily demonstrates the absurdity of this interpretation.

In order to become entitled to any income from the 1934 Trust (i) the *Amici* (i.e., Amory Houghton ("Amory") and Eleanor H. Cole ("Eleanor")) had to survive Elisabeth, who was 9 years younger than Amory and 12 years younger than Eleanor, *and* (ii) Elisabeth had to die without issue. In December of 1934 Elisabeth was only 26 years of age and in good health. The likelihood that Amory or Eleanor would ever receive any interest in the

income of the trust was, therefore, exceedingly remote. Obviously, the far greater likelihood was that Elisabeth would have children or that, since she was considerably younger than the *Amici,* she at least would survive them.

The likelihood that the *Amici* would ever receive any interest in the corpus of the trust remainder was even more remote because, in order to do so, they had to survive Elisabeth and the measuring life, and the measuring life was 33 years younger than one of the *Amici* (i.e., Amory) and 36 years younger than the other *Amici* (i.e., Eleanor).

Moreover, even if it ever did eventuate that Amory or Eleanor acceded to a possessory interest in the trust, the contingencies were such as to render it impossible to ascertain, as of the time the trust was created, the amount or value of the interest that they would receive. In the case of the interest that they would receive in the income of the trust remainder, their percentage share was dependent upon the number of issue of Alanson B. Houghton who survived Elisabeth. In the case of the interest that they would receive in the corpus of the trust remainder, their percentage share was dependent upon the number of issue of Alanson B. Houghton who survived the measuring life.

In order for the five remaining *Amici* to become entitled to any income from their trust (i.e., the 1941 Trust) they had to (i) survive the life income beneficiary, Elisabeth, *and* (ii) Elisabeth had to die without issue. As noted, at the time of creation of the 1941 Trust, Elisabeth still was only 32 years of age and in good health. Accordingly, there was every reason to expect that, in the normal course of events, she would have children with the result that the *Amici* would never have received a possessory interest of any kind in the trust.

Moreover, even if Elisabeth died without children and the *Amici* survived her, there was a further contingency

as to the amount of the income interest they would receive since their percentage share was dependent upon the number of other grandchildren of Alanson B. Houghton who either survived Elisabeth or who had issue that survived Elisabeth. Furthermore, in order to receive any interest in the corpus of the trust remainder, the *Amici* (with the exception of Laura H. Beer) also had to survive Laura H. Beer (who was younger then the other *Amici*). Again, even if the *Amici* had satisfied the triple contingencies of (i) having Elisabeth die without issue, (ii) surviving Elisabeth, and (iii) surviving the youngest grandchild, each of the *Amici's* percentage share in the corpus of the trust remainder was dependent upon the number of grandchildren who survived Laura H. Beer, or who had issue that survived Laura H. Beer.

Accordingly, because of the number of family members and the tremendous variance in their ages, it would have been impossible to ascertain at the time that the two trusts were created whether any of the *Amici* would ever receive a possessory interest in the trusts, or, if such a possessory interest did eventuate, what the amount or value thereof would be.

The most extreme of the situations in this regard, of course, is that posed by the two *Amici* (i.e., Amory and Eleanor) who were considerably *older* then the life beneficiary. It was highly unlikely that they would survive the life beneficiary, wholly apart from the further unlikelihood that the life beneficiary (a woman of only 26 years and in good health at the time the trust was created) would die without issue. To measure the timeliness of the disclaimer of such remote remainder interests from the date of the creation of the trust (i.e., December of 1934) is not only unreasonable but, indeed, patently absurd. To do so would impose on these *Amici* the unreasonable burden (both in terms of unnecessary effort and

expense) of disclaiming their remainder interests at a time when it was unlikely that they would ever receive anything whatsoever from the trust or, if the unexpected occurred, at a time when the amount or value of what they would ever receive was almost totally conjectural.

As a matter of policy and common sense, a remainderman, of course, should not be put to the burden of having to disclaim his remainder interest when it is subject to these types of contingencies. This principle, moreover, is implicitly recognized in the Treasury Regulation since it refers to the time when the disclaiming party first acquires "knowledge" of the transfer and provides that the disclaimer does not constitute a taxable gift so long as it is made within a reasonable time after such "knowledge" is first acquired.

This principle also was recognized by the Eighth Circuit in *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), *rev'g* 58 T.C. 352 (1972), which held that the reasonable time for disclaiming a contingent remainder interest commenced upon the death of the life income beneficiary, and not upon the creation of the trust. The Eighth Circuit focused on the fact that prior to the death of the life income beneficiary the contingent remainderman had nothing to accept or renounce. The Eighth Circuit, citing this Court in support of its reasoning, stated:

> "A remainder subject to divestment [i.e., contingent remainder] does not convey or transfer any actual control or current beneficial interest in property to the remainderman. In *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 42-43, 60 S. Ct. 51, 55, 84 L.Ed. 20 (1939), the Supreme Court in construing an earlier gift tax statute where the Government was unable to determine which construction of the statute would be most advantageous to it from the point of revenue collected said: 'When

> the gift tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title.' In discussing the taxable event of the relinquishment of the power of revocation as distinguished from the transfer of the corpus in trust, the Court said its dominant principle or rationale has been:
>
> > '. . . that "taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed" See Corliss v. Bowers, 281 U.S. 376, 378 [50 S.Ct. 336, 74 L.Ed. 916]; Saltonstall v. Saltonstall, *supra*, 261 [276 U.S. 260, 48 S.Ct. 225, 72 L.Ed. 565 (1928)]; Burnet v. Guggenheim, *supra* 287 [288 U.S. 280, 53 S.Ct. 369, 77 L.Ed. 748 (1933)] and that a retention of control over the disposition of the trust property, whether for the benefit of the donor or others, renders the gift incomplete until the power is relinquished whether in life or at death.' 308 U.S. at 43, 60 S.Ct. at 56." 480 F.2d at page 64.

The fairness of this approach was further underscored by the Eighth Circuit in *Cottrell* v. *Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (*en banc*), *rev'g* 72 T.C. 489 (1979), which again involved the issue of when the reasonable time to disclaim a contingent remainder interest commenced. The court, in following *Keinath*, stated:

> "It is only fair—or so Congress and the Treasury could well have concluded in enacting § 2511 and issuing regulations thereunder—that a taxpayer know what property is involved before being put to her election whether to accept or disclaim it." 628 F.2d at page 1131.

Applying these principles to the instant case, the date of the "transfer" for purposes of the Treasury Regulation should not be the date of the creation of the trust, but should be that point in time when the contingencies, both as to receiving any possessory interest whatsoever and as to the amount or value of such possessory interest, are eliminated. In the instant case, that date will not occur until the last income beneficiary dies. In light of these considerations, the *Amici* respectfully submit that the Ninth Circuit's decision in the instant case that the timeliness of the disclaimer is instead to be measured from the creation of the trust is unreasonable and erroneous.

II.

The disclaimer by the Petitioner did not constitute a taxable transfer under Section 2511 of the Code because the disclaimer was effective and timely under applicable local law.

If the Treasury Regulation does not admit to the construction that the transfer in a situation such as the instant case occurs upon the death of the life income beneficiary when the contingencies are eliminated, then it does not constitute a reasonable interpretation of Section 2511 of the Internal Revenue Code of 1954, as amended (the "Code"), and is therefore invalid. The correct interpretation of Section 2511 of the Code is that a disclaimer does not constitute a taxable transfer for Federal gift tax purposes where, as here, it is effective and timely under applicable local law.

Section 2511 of the Code provides that the Federal gift tax shall be imposed "whether the *transfer* is in trust or otherwise, whether the gift is direct or indirect . . . ." (emphasis added). It is well established that if a disclaimer

is valid under applicable local law, it does not constitute a "transfer" by the disclaimant because title to the property is considered never to have vested in the disclaimant or passed through his hands. Scott, *The Law of Trusts*, § 36.1 (3rd Ed. 1967); *Albany Hospital* v. *Albany Guardian Society*, 214 N.Y. 435, 108 N.E. 812 (1915).

The issues of effectiveness and timeliness of disclaimers for Federal gift tax purposes are the same as those for Federal estate tax purposes, because the Federal gift tax and the Federal estate tax are "in *pari materia* and must be construed together." *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939).

It was established in *Brown* v. *Routzahn*, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933), that a disclaimer which is effective and timely under applicable local law is not a taxable transfer for Federal tax purposes. In *Brown*, a husband disclaimed a bequest under his wife's will eight years after the will had been probated and his interest had become indefeasibly vested and possessory. The Sixth Circuit looked to the applicable local law (Ohio) on the issues of effectiveness and timeliness, and held that the disclaimer, being effective and timely under local law, was not a taxable transfer for Federal estate tax purposes.

The rule established by the Sixth Circuit in *Brown* was, ironically, embraced by the Ninth Circuit, as well, in *Commissioner* v. *Estate of Vease*, 314 F.2d 79 (9th Cir. 1963), *rev'g* 35 T.C. 1184 (1961). The Ninth Circuit cited *Brown* and then observed:

> "It was there laid down that the federal tax on transfers . . . is levied on the transfer of property; not on the exercise of a right to renounce testamentary gifts. Accordingly, if under local law a legatee or devisee has the option of accepting or

> rejecting his testator's bounty, rejection of the gift does not result in a taxable transfer to its residuary recipient." 314 F.2d at 88.

The Eighth Circuit in *Keinath* reaffirmed the correctness of this approach by looking to state law for guidance as to the effectiveness and timeliness of a disclaimer for Federal tax purposes. As noted, the Eighth Circuit held, with respect to the disclaimer of a contingent remainder interest in a trust, that since under applicable local law the "transfer" occurred upon the death of the life income beneficiary and not upon the creation of the trust, the "transfer" for Federal gift tax purposes occurred upon the death of the life income beneficiary. *See also Cottrell, supra.*

In the instant case the disclaimer was timely and effective under applicable local (Massachusetts) law. Accordingly, the disclaimer did not constitute a taxable transfer for Federal gift tax purposes under Section 2511 of the Code. If (contrary to Argument I above) the Treasury Regulation does not admit to this construction, it does not constitute a reasonable interpretation of Section 2511 of the Code and is therefore invalid.

III.

The legislative history of Section 2518 of the Code clearly indicates that the Eighth Circuit decision in *Keinath* correctly interprets existing law.

The legislative history of Section 2518 of the Code indicates that the primary concern in enacting that Section was to create uniformity throughout the country in the Federal gift tax consequences that result from disclaim-

ers. The legislative history states that the concern was that:

> "The Federal tax consequences of a disclaimer will largely depend upon its treatment under local law . . . As a result identical refusals to accept property may be treated differently for estate and gift tax purposes depending upon applicable local law." H.R. Rep. No. 94-1380, 94th Cong., 2d Sess. 66, reprinted in 1976-3 C.B. (Vol. 3) 800.

Accordingly, Congress acknowledged that the Eighth Circuit decision in *Keinath* was the correct result under existing law, but that, because of the variance in local law, *Keinath* might not apply in all cases. Under similar local law (such as the law of Massachusetts which governs in the instant case), a similar result would, however, occur.

Congress was careful, in the effective date provision of Section 2518 of the Code, to indicate which disclaimers were affected by the new rule. If Congress had determined that the Eighth Circuit decision in *Keinath* was an incorrect interpretation of existing law, it presumably would have required that all existing remainder interests be disclaimed within a certain time period. Instead, Congress chose a far less stringent effective date provision that applies the new Section only to transfers creating an interest in the disclaimant made after December 31, 1976. Pre-Section 2518 law is to continue to apply to interests created by transfers made prior to that date.

Section 2518 of the Code was enacted as part of the Tax Reform Act of 1976 (the "Act"). It is therefore of great significance to compare and contrast the legislative history of Section 2518 of the Code with that of other provisions of the Act.

For example, with respect to Section 2101(b) of the Act relating to a cooperative housing corporation's ability to

take depreciation deductions, the legislative history states that the decision by the Tax Court in *Park Place Inc.*, 57 T.C. 767 (1972), was not consistent with the original intent of Congress in enacting the existing law on the subject. The provision of the new Act was made retroactive to December 31, 1973.

The legislative history with respect to Section 805 of the Act, relating to the investment tax credit for certain vessels, demonstrates yet another approach. The Act, in this respect, provides for an investment tax credit of one-half the regular credit with respect to certain purchases made with the use of certain tax-deferred funds. The legislative history states:

> "[T]he conferees intend that taxpayers are to have the right to obtain a court determination as to whether they are, under already existing law, also eligible for the other one-half of the regular investment credit. The conferees intend that no inferences be drawn either way on this issue from the action taken here." H.R. Rep. No. 94-1515, 94th Cong. 2d Sess. 447.

With respect to disclaimers under Section 2518 of the Code, it is clear that Congress did not state, as it did with respect to the above provision of the Act relating to depreciation deductions for a cooperative housing corporation, that the case law on the subject was an incorrect interpretation of existing law. Nor did Congress state, as it did with respect to the above provision of the Act relating to the investment tax credit, that there was no case law precedent as to the proper interpretation of existing law, that no inference should be drawn either way from the new provision, and that taxpayers were invited to initiate litigation to determine their rights under existing law.

To the contrary, the legislative history with respect to disclaimers under Section 2518 of the Code refers to the

Eighth Circuit decision in *Keinath*, does not state that it is an incorrect interpretation of existing law, but instead specifically implies that Congress expects this decision to apply to cases, like the instant case, where the applicable local law is the same as that involved in *Keinath*. As stated by the Eighth Circuit in *Cottrell*:

> "The report of the Committee on Ways and Means appears to acknowledge that [the Eighth Circuit decision in] *Keinath* was a correct statement of what the law was then (and still is as to interests created before the Act's effective date)." 628 F.2d at 1131 N.7.

CONCLUSION

For all of the foregoing reasons, the *Amici* submit that the Petitioner in the instant case did not make a taxable transfer for Federal gift tax purposes when he disclaimed his remainder interest in his grandmother's trust, and that the decision of the Ninth Circuit should therefore be reversed.

Dated July 16, 1981

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No. 80-1614

In the Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE F. JEWETT, JR., et ux.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE, MAYER, BROWN & PLATT

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STATEMENT OF INTEREST

Amicus curiae, MAYER, BROWN & PLATT, is a law firm with principal offices in Chicago, Illinois. A number of its clients and some of its partners are interested in the outcome of this proceeding because they are in a position substantially identical to that of petitioners. Both parties have consented to the filing of this brief.*

*Their consents have been filed with the Clerk.

ARGUMENT

In the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976), Congress changed the law governing the time for disclaimers. The legislative history of Section 2518 of the Internal Revenue Code of 1954 clearly indicates that the statute was intended primarily to overturn the decision of the Eighth Circuit Court of Appeals in *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), *rev'g.* 58 T.C. 352 (1972); *see* H. R. Rep. No. 94-1380, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976-3 C.B. (Vol. 3) 800. The Congressional action, however, was prospective only, since it made the 1976 amendments applicable only to trusts created after December 31, 1976. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(e)(2), 90 Stat. at 1896; H. R. Rep. No. 94-1380, 94th Cong., 2d Sess. 67-68, *reprinted in* 1976-3 C.B. (Vol. 3) 801-02.

In the case at bar, the Internal Revenue Service has attempted to extend the prospective rule of Section 2518 to transfers of property occurring prior to 1977. Taxpayers and their advisors have for many years relied on the assumption that a disclaimer, valid under state law, was valid for federal tax purposes as well if timely made. Disclaimers of interests that have not vested indefeasibly have been thought to be timely if made within a reasonable time after such interests do so vest. As indicated by Judge Harris in his dissenting opinion below, the only precedent from a Court of Appeals on this matter has been the *Keinath* case, which took that view. It would be highly inequitable to change the rule retroactively as to such taxpayers, particularly when Congress did not so intend. For

this Court to follow the opinion of the court below would give the 1976 statutory amendments retroactive effect contrary to the intent of Congress, and would frustrate the reasonable expectations of many taxpayers.

CONCLUSION

For the reason stated, *amicus curiae* urges that the holding of the Court of Appeals be reversed.

Respectfully submitted,

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Respondent.

BRIEF OF AN AMICUS CURIAE

Statement of Interest and Rule 36.2 Compliance

This brief of an amicus curiae is being filed pursuant to Rule 36.2 of the Supreme Court Rules of Practice and Procedure on behalf of the Estate of Helen W. Halbach, John Poinier, Executor. The Halbach Estate is litigating with respondent the issue in this case. *See Estate of Halbach v. Commissioner,* 71 T.C. 141 (1978), and 40 T.C.M. 952 (1980). Copies of written consents to the filing of this brief, as required by that Rule, have been filed with the Office of the Clerk of the Supreme Court by both parties.

Summary of Argument

The 1933 decision of *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933), held that a disclaimer that was timely under State law did not constitute a taxable transfer for Federal transfer tax purposes. As shown by materials obtained under the Freedom of Information Act which are discussed below, respondent followed *Brown v. Routzahn* and attempted to codify it in 1958 in Treas. Reg. § 25.2511-1(c). If it was so codified, then George Jewett, Jr. should owe no tax, since his disclaimer was timely under State law. If *Brown v. Routzahn* was not so codified, the law thus being changed by the regulation, then respondent's application of that regulation (as now interpreted by respondent) to disclaimers of interests (such as that of George Jewett, Jr.) created before promulgation of the regulation is unfair, constitutes an abuse of respondent's discretion, and should be given no weight.

Case Law Background

In 1933, the United States Court of Appeals for the Sixth Circuit decided *Brown v. Routzahn*, 63 F.2d 914, *cert. denied*, 290 U.S. 641 (1933). The Sixth Circuit stated that there was no requirement under the relevant State law of Ohio that a disclaimer be made within any particular period of time to be valid, so long as it was made before actual distribution of the property. That Court then found that the disclaimer therein was valid under Ohio law, that the disclaimer simply constituted the exercise of a right to reject receipt of property rather than the transfer of property, and that the disclaimer therefore was not a "transfer" for Federal estate tax purposes.[1]

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1 The Federal estate and gift taxes are *in pari materia* and must be construed together, *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939), and the concept of "transfer" has been interpreted in the same manner under each tax. *See, e.g., Estate of Halbach v. Commissioner*, 71 T.C. 141 (1978).

Subsequent to *Brown v. Routzahn*, the Internal Revenue Service never publicly disagreed with that decision. No other decision bearing upon this issue arose from 1933 until 1952, when the Eighth Circuit decided *Hardenbergh v. Commissioner*, 198 F.2d 63, *cert. denied*, 344 U.S. 836 (1952). In *Hardenbergh*, the decedent died intestate and the Eighth Circuit found that the disclaimant's interest had vested under Minnesota law immediately upon the death of the decedent. The Eighth Circuit accordingly held that an effective disclaimer could not be made of such interest for Federal gift tax purposes because Minnesota law did not recognize as effective a disclaimer of an intestate interest which had immediately vested.

Hardenbergh thus left unchanged the rule of *Brown v. Routzahn* that a disclaimer which was effective under State law would be recognized for Federal transfer tax purposes, and indeed, *Hardenbergh* cited *Brown v. Routzahn* with approval with respect to disclaimers of testamentary gifts, carefully distinguishing *Brown v. Routzahn* on the basis of the testate-intestate State law difference. 198 F.2d 66.

Thus, prior to 1958 nothing in Federal transfer tax law would cause a holder of a remainder interest created by will to disclaim immediately upon creation of the interest, nor does there appear to have been any such impetus under State law. Against this historical background, the final version of Treas. Reg. § 25.2511-1(c) was published in 1958.

The 1978 Freedom of Information Act Request

On June 13, 1978, the United States Tax Court stated in this case (70 T.C. 430, 432-433) that "[t]he answer to [the question at issue] is to be found in the proper interpretation of section 25.2511-1(c), Gift Tax Regs. . . ." The Tax Court noted in footnote 4, at 70 T.C. 436, that "[p]etitioner also relies upon *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), certiorari denied, 290 U.S. 641. That case interpreted provisions of the Revenue Act of 1921, and did not purport to consider the effect of the

regulations which control the disposition of this case." In view of this language, on July 21, 1978 the undersigned filed a request with respondent under the Freedom of Information Act (5 U.S.C. § 552) for:

> 1. The file of the Legislation and Regulations Division, Office of the Chief Counsel, I.R.S., underlying preparation of Treasury Decision (T.D.) 6334 (filed November 14, 1958) (which contained Treas. Reg. § 25.2511-1(c)), sometimes called the 'T.D. file.'
>
> 2. The technical memorandum, if any, accompanying T.D. 6334 from the Internal Revenue Service to the Treasury Department.
>
> 3. Any other materials underlying preparation or interpretation of T.D. 6334 not contained in the file described above in paragraph 1.

Quick disposition of this request was expected in light of the duty of respondent to dispose of the request within 10 working days and of any administrative appeal within 20 working days, see 5 U.S.C. § 552(a)(6)(A), and in light of the burden upon respondent to sustain any decision not to make all requested records available. *See* Treas. Reg. § 601.702(c)(ii); *Mead Data Central, Inc. v. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Conway v. I.R.S.*, 447 F. Supp. 1128, 1134 (D.D.C. 1978).

Before respondent did respond to the Freedom of Information Act request, however, the Tax Court filed its opinion in *Estate of Halbach v. Commissioner*, 71 T.C. 141, on November 9, 1978. The Tax Court held that the disclaimer at issue therein constituted a "transfer" for Federal estate tax purposes under Section 2035[2] and stated:

> Petitioner also contends that respondent's application of the reasonableness test of section 25.2511-1(c), Gift

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2 Statutory references are to the Internal Revenue Code of 1954, unless otherwise indicated.

> Tax Regs., is an abuse of the Commissioner's discretion. We think he confuses the retroactive application of a case interpreting that section with the retroactive application of the regulation itself. *Jewett v. Commissioner, supra,* is an interpretation of that regulation as applied to a 1972 disclaimer of an irrevocable interest created in 1939. Herein we are considering the effect of a 1970 disclaimer of an interest created in 1937. While we are not relying on this gift tax regulation as dispositive of the estate tax question before us, we do not agree with petitioner that the regulation's interpretation of a section 2511 transfer should be disregarded in our determination of whether a section 2035 transfer existed. In any event, petitioner can hardly contend he lacked notice with respect to a regulation adopted in 1958, T.D. 6334, 1958-2 C.B. 628.

The opinion cited footnote 4 of the Tax Court's opinion in *Jewett* in dismissing *Brown v. Routzahn* because "that case * * * did not have to consider sec. 25.2511-1(c), Gift Tax Regs." (71 T.C. 146).

Respondent did not dispose of the Freedom of Information Act request for over one year after it was filed, as respondent's representatives needed repeated extensions of time on the grounds that the various records requested had not yet been located or, later on, that they had not yet been prepared for disclosure. Appendix 1 is a copy of respondent's response on July 25, 1979. Even then, most of the materials requested were withheld, and nothing of substantive importance was contained in the materials that were released.

On August 13, 1979, an appeal of respondent's refusal to release all documents requested was filed. Respondent denied that appeal entirely on November 19, 1979. See App. 2. The undersigned accordingly filed a Complaint against respondent under the Freedom of Information Act in the United States District Court for the District of Columbia on February 20, 1980. See App. 3.

In response to that Complaint, the Department of Justice released the remainder of the documents requested on May 9, 1980, except for three General Counsel Memoranda (G.C.M.s) and the Technical Memorandum for T.D. 6334. See App. 4. The Department of Justice then stipulated that it would release those documents if the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's decision in *Taxation With Representation Fund v. Internal Revenue Service*, 485 F. Supp. 263 (D.D.C. 1980), in which respondent was ordered to disclose all G.C.M.s and T.M.s issued after July 4, 1967. The District of Columbia Circuit did affirm the District Court's decision in all material aspects, ____ F.2d ____, 47 A.F.T.R. 2d 81-1026, 81-1 U.S.T.C. 86,580 (Mar. 12, 1981), and the Technical Memorandum and two of the three G.C.M.s were just released on June 15, 1981. See App. 5. The last G.C.M. being withheld was written in 1964, according to the Department of Justice. The undersigned are continuing efforts to secure release of that G.C.M., which is still being withheld almost three years after the Freedom of Information Act request was filed.

Contents of T.D. File Documents Released

The documents released by the Department of Justice show, as will be discussed below, that respondent intended to codify *Brown v. Routzahn* in Treas. Reg. § 25.2511-1(c). These materials provide compelling grounds for discounting entirely the interpretation of Treas. Reg. § 25.2511-1(c) which respondent now urges and for holding that application of such regulation to disclaimers of interests created before 1958 constitutes an abuse of respondent's discretion under Section 7805(b).[3]

Turning now to the specific materials obtained from the T.D. file, Appendix 6 is a transmittal memorandum dated May 25, 1956 for a proposed revenue ruling to be published prior to the

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3 Section 7805(b), which allows respondent to make regulations prospective only in effect, will be discussed more fully below.

regulation in issue. Since the ruling involved Section 7805(b), the Commissioner had to approve it for publication personally, and the memorandum states that it accordingly had to be cleared with the Technical Planning Division before it could be resubmitted to the Commissioner for approval.

The proposed ruling (App. 7) holds that a renunciation of an inheritance or legacy under a will constitutes a taxable "transfer" for gift tax purposes, regardless of property law title considerations. No reasonable time standard is articulated by the ruling. The ruling states, however, as follows (App. p. 15a):

> [U]nder the authority contained in Section 7805(b) of the Internal Revenue Code of 1954, the ruling set forth herein will not be applied retroactively with respect to such renunciation which became absolute and irrevocable prior to _____, the date of this Bulletin.

The use of Section 7805(b) in this ruling evidences an awareness that the ruling would change existing law. More importantly, the use of Section 7805(b) evidences an awareness that it would be an abuse of discretion to apply this interpretation to previous disclaimers. The undersigned submit that an equitable application of Section 7805(b) to this ruling would require that a disclaimer of any interest created before publication of the ruling be exempted from application of the ruling, or at least be made within a specified time after its publication, since otherwise holders of prior interests would be deprived of the opportunity previously available to others to disclaim without incurring a tax (in the Service's view). Congress took such an approach in the Tax Reform Act of 1976 by subjecting to Section 2518 only disclaimers of interests created after 1976; a post-1976 disclaimer of a pre-1977 interest is not subject to the change in law effected by Section 2518. *See* Section 2009(e), P.L. 94-455, 90 Stat. 1520. In any event, the ruling establishes that respondent thought it necessary to provide relief under Section 7805(b) with respect to this very issue in the course of preparation of the regulation in issue.

As shown by Appendix 8, the proposed ruling was inconsistent with a regulation being drafted under the 1954 Internal Revenue Code. Accordingly, a tightly-written memorandum was drafted which recommended withholding publication of the ruling pending promulgation of the final gift tax regulations (App. 9):

* * *

> In the past the Service has followed the decisions of the courts in the cases of *Brown v. Routzahn*, 63 F.2d 914, and *Hardenbergh v. Commissioner*, 198 F.2d 63, in determining whether the renunciation of a gift, bequest, or inheritance constitutes the making of a gift. Pursuant to *Brown v. Routzahn*, the Service has taken the position that if the decedent's death did not automatically vest title in the beneficiary, a timely renunciation of the bequest would not constitute the making of a gift. However, pursuant to the *Hardenbergh* case, the Service took the position that if title vested immediately, then the beneficiary by renouncing the bequest gave up something legally owned by him and thereby made a gift. The distinction between the cases is whether title *vested* in the beneficiary. The proposed revenue ruling would, among other things, abolish the distinction and hold that a renunciation under the circumstances present in the *Brown v. Routzahn* case (where the renunciation became effective before legal title vested in the beneficiary) constitutes the making of a gift.
>
> At the time the gift tax regulations under the 1954 Code were being developed, consideration was given to the inclusion in the regulations of the rules in *Brown v. Routzahn* and *Hardenbergh v. Commissioner*. The proposed published ruling was reviewed by this Division and by the Legal Advisory Staff in connection with the consideration given to this matter. All persons concerned believed that the distinction drawn by these court decisions was artificial, and that renunciations under both sets of circumstances should be treated in the same manner. However, several persons felt that a reversal at this time

of the Service's prior position might result in legislation excluding from gift tax renunciations under both sets of circumstances, and, therefore, that the prior position of the Service with respect to cases coming within the *Brown v. Routzahn* decision should not be changed. Mr. Laurens Williams, at that time Assistant to the Secretary (and Head, Legal Advisory Staff) inclined to this view. As a result language has been inserted in the proposed gift tax regulations adopting the rules in these two court decisions. The language in the proposed regulations (section 25.2511-1(c)) on the subject reads as follows:

> " * * * The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does [not] immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. * * * "

This memorandum establishes that respondent followed *Brown v. Routzahn* before 1958 and that respondent intended to codify that case in the regulation. *Cf.* Prop. Treas. Reg. § 25.2511-1(c), published in the Federal Register on January 3, 1957. This memorandum was written sometime between May 25, 1956 (App. 6) and October 11, 1957, when the final version of the memorandum (which omitted most of the substantive comments contained above) was typed (App. 10).

Sometime after the final memorandum draft was initialled on December 16, 1957 (App. 10) and before promulgation of the final regulation on November 14, 1958, Mr. Paul Schmid, apparently of the Legislation and Regulations Division of the Office of Chief Counsel, I.R.S. (App. 11, p. 24a), listed a number of changes to be made in the final gift tax regulations draft, including the following: "On page 32, paragraph (c) the

renunciation rule should not depend on testacy v. intestacy." (App. 11).

Also during that period, respondent's final analysis of the disclaimer regulation was set forth in the Technical Memorandum for the regulation, dated October 1, 1958. The Technical Memorandum is the official Internal Revenue Service explanation to the Treasury Department concerning the regulation and as such is a form of legislative history for the regulation. *See Taxation With Representation Fund v. Commissioner,* ____ F.2d ____, 47 A.F.T.R. 2d 81-1026, 81-1 U.S.T.C. 86,580 (D.C. Cir. Mar. 12, 1981). The Technical Memorandum (App. 12) stated in relevant part as follows:

> MEMORANDUM FOR: Honorable Robert B. Anderson
> Secretary of the Treasury
>
> SUBJECT: Proposed Treasury decision — Regulations under provisions of the Internal Revenue Code of 1954 relating to the gift tax.
>
> There is transmitted herewith, with the recommendation that it be approved, a proposed Treasury decision which would issue the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B of the Internal Revenue Code of 1954. * * *
>
> * * *
>
> * * * A few significant changes were made in the portions of the proposed regulations which pertain to subjects peculiar to the gift tax. These changes may be summarized as follows:
>
> *Disclaimers.*
>
> Paragraph (c) of section 25.2511-1, as set forth in the notice, discussed certain acts which constitute the making of a gift. Among the acts discussed is the renunciation, or attempted renunciation, of property, or a property interest, passing from a decedent. In what was intended to be the application of the rules in *Brown v. Routzahn* (1933) 63 F.2d 914, cert. denied 290 U.S. 641, and *Har-*

denbergh v. Commissioner (1952) 198 F.2d 63, cert. denied 344 U.S. 836, it was stated that where title to the property did not vest in the beneficiary or heir immediately upon the decedent's death, the renunciation of the property did not constitute the making of a gift, but that where title vested in the beneficiary or heir immediately upon the decendent's death, the act of the beneficiary or heir in giving up what passed to him from the decedent constituted the making of a gift. Furthermore, in the notice the position was taken in paragraph (c) that a partial renunciation of property could not be made. Protests on these provisions were received. After reviewing these protests, we have reconsidered our position and now believe that the proper distinction between these two court cases turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property which passed from the decedent. Accordingly, we have revised paragraph (c) of section 25.2511-1 to reflect this change of position. Also, we have abandoned the position that a partial renunciation cannot be made, and paragraph (c) has been further changed to recognize a partial renunciation where it is effective, as such, under local law.

* * *

[s] Commissioner
[of Internal Revenue]

The Technical Memorandum thus also establishes that respondent intended to codify *Brown v. Routzahn* in the regulation and, in fact, thought the final regulation represented a more accurate codification than the proposed regulation. No other proposed regulations were issued before the final regulation was promulgated (see T.D. 6334, 1958-2 C.B. 627).

No other material released under the Freedom of Information Act illuminates the reasoning underlying adoption of the language contained in Treas. Reg. § 25.2511-1(c) (the "protests" mentioned in the Technical Memorandum have been requested from the Department of Justice, and respondent is now searching for them).

Conclusions of Fact

A number of critical considerations emanate from these materials. First, a holder of an interest during the period from 1933 (when *Brown v. Routzahn* was decided) through 1957 could reasonably and correctly have believed that a disclaimer of such interest which was permitted under State law would not incur a Federal estate or gift tax. It was reasonable for taxpayers to have relied on *Brown v. Routzahn* and to have structured their affairs accordingly.

Second, respondent considered at length whether to follow *Brown v. Routzahn* during the course of preparation of the regulation, and a policy decision was made to follow *Brown v. Routzahn* in the regulation. The memorandum reproduced in Appendix 9 stated that several persons, including Mr. Laurens Williams (Assistant to the Secretary of the Treasury and Head of the Legal Advisory Staff), thought that respondent should continue to follow *Brown v. Routzahn* and *Hardenbergh v. Commissioner* and that "*[a]s a result* language has been inserted in the proposed gift tax regulations *adopting the rules in these two court decisions.*" (emphasis added) Similarly, the Technical Memorandum states that the proposed regulation was "intended to be the application of the rules in *Brown* * * * and *Hardenbergh* * * * " and that the final regulation was revised to reflect respondent's change in position that the proper distinction to be made in applying such rules was whether a disclaimer could be made "under the applicable State law", rather than whether title to the property had vested before the disclaimer was made.

Finally, respondent realized during preparation of Treas. Reg. § 25.2511-1(c) that a reversal of his position in the disclaimer area was a suitable occasion for the exercise of discretion under Section 7805(b), as evidenced by the invoking of such relief by the proposed revenue ruling.

Argument

A Technical Memorandum is a form of legislative history with respect to a Treasury regulation. *See Taxation With Representation Fund v. Commissioner,* ____ F.2d ____, 47 A.F.T.R. 2d 81-1026, 81-1030, 81-1038, 81-1040, 81-1 U.S.T.C. 86,580, 86,584, 86,592, 86,596 (D.C. Cir. Mar. 12, 1981). Since legislative history is used as an aid to interpret ambiguous legislation, the undersigned submit that a Technical Memorandum rightfully may be used to interpret an ambiguous Treasury regulation. Indeed, a Technical Memorandum "may tell more about a regulation than the regulation itself." *Taxation With Representation Fund v. Commissioner, supra* at 47 A.F.T.R. 2d 81-1029, 81-1040, 81-1 U.S.T.C. 86,584, 86,594.

The final version of Treas. Reg. § 25.2511-1(c) was ambiguous due to use of the phrase "reasonable time after knowledge of the existence of the *transfer.*" (emphasis added) Since *Brown v. Routzahn* turned on the Ohio law question of whether the disclaimer was made at any time before the property was actually distributed to the disclaimant, and since State law generally permitted disclaimers of remainder interests to be made immediately after the death of the life beneficiary, the public was justified in believing that the term "transfer" required an actual vesting of the right to possession of property in the remainder interest context. By contrast, respondent now interprets "transfer" to mean the transfer of property in trust following a decedent's death. Respondent's ambiguous statement of the reasonable time standard in the final regulation avoided the potential Congressional reversal (and possible public objections) feared by respondent's representatives (see App. 9) and has afforded respondent room to assert that *Brown v. Routzahn* has been displaced by the regulation, notwithstanding the intent of the drafters of the regulation. Had the regulation's standard been clearly stated, however, taxpayers undoubtedly would have re-evaluated both the entire area of disclaimers and any particular disclaimers that they had already contemplated making when the regulation was pro-

mulgated. The regulation is ambiguous, and thus, the Technical Memorandum is a legitimate source of interpretation in this case.

The Technical Memorandum and the other materials discussed above show that respondent attempted to follow *Brown v. Routzahn* in Treas. Reg. § 25.2511-1(c). That attempt erred, however, because the "reasonable time after knowledge of the existence of the transfer" test, as now interpreted by respondent, is inconsistent with the letter and spirit of *Brown v. Routzahn:* first, because the disclaimer in *Brown v. Routzahn* came seven years after the disclaimant had knowledge of the interest, and second, because the thrust of *Brown v. Routzahn* was that a disclaimer that was valid under State law did not constitute a transfer for Federal transfer tax purposes. Since post-1958 disclaimers made under State law might or might not be made within a "reasonable time after knowledge of the existence of the transfer," the regulation as now applied by respondent does not accurately follow *Brown v. Routzahn.*

It appears that the drafters of the regulation did not consider such a potential inconsistency. Their lack of focus on the critical "reasonable time after knowledge of the existence of the transfer" test is reflected by the complete lack of discussion of such test in any of the materials discussed above. Further, the drafters' stated belief that they were codifying *Brown v. Routzahn* explains why they gave no thought to giving prospective relief under Section 7805(b) to holders of pre-1958 interests: since the regulation represented to the drafters no apparent change in position from *Brown v. Routzahn,* no need for such relief existed.

The position of respondent now, however, is that the regulation added a Federal reasonable time test for disclaimers. If this position is correct, then respondent's failure to afford relief to holders of prior interests following his change in position is indefensible.

Respondent's position is accordingly untenable in either event. If *Brown v. Routzahn* is codified in the regulation, then

George Jewett, Jr. and similarly-situated taxpayers should owe no tax. If *Brown v. Routzahn* is not codified, then George Jewett, Jr. and similarly-situated taxpayers should have been afforded a grace period following adoption of the regulation in which to disclaim, or the regulation should have been made applicable only to disclaimers of interests created after 1958. In other words, application of this regulation to George Jewett, Jr. and similarly-situated taxpayers is unreasonable and unfair.

Assuming that this Court finds that *Brown v. Routzahn* was not accurately codified in the regulation, respondent's failure to apply that regulation with only prospective effect constituted an abuse of respondent's discretion under Section 7805(b). That Section states that "[t]he Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive *effect*." (emphasis added) Although the language of the statute, as well as its legislative history,[4] might suggest that Section 7805(b) was simply intended to afford respondent the opportunity to grant discretionary relief to taxpayers, the courts have subsequently imposed a duty upon respondent not to abuse this discretion. *See, e.g., Automobile Club of Mich. v. Commissioner,* 353 U.S. 180, 184 (1957). Thus, as the Court of Claims stated in *International Business Machines Corp. v. United States,* 343 F.2d 914 (Ct. Cl. 1965), *cert. denied,* 382 U.S. 1028 (1966),

> Implicit, too, in the Congressional award of discretion to the Service, through Section 7805(b), is the power as well as the obligation to consider the totality of the circumstances surrounding the handing down of a ruling * * * This factor has come to be recognized as central to the administration of the section. * * *
>
> * * * [Also] inherent to Section 7805(b) is that the Commissioner's exercise of discretion is reviewable (in a

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4 H.R. Rep. No. 350, 67th Cong., 1st Sess. 15 (1921); S. Rep. No. 275, 67th Cong., 1st Sess. 32 (1921); H.R. Rep. No. 1882, 70th Cong., 1st Sess. 22 (Amendment 185) (1928); H.R. Rep. No. 704, 73rd Cong., 2d Sess. 38 (1934).

> proper proceeding) for abuse, in the same way as other discretionary administrative determinations. The Internal Revenue Service does not have *carte blanche*. Its choice must be a rational one, supported by relevant considerations.

In sum, as this Court stated in *Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 184 (1957), "it is clear from the language of the section and its legislative history that Congress thereby confirmed the authority of the Commissioner to correct any ruling, regulation, or Treasury decision retroactively, but empowered him, in his discretion, to limit retroactive application *to the extent necessary to avoid inequitable results.*" (emphasis added; fn.ref. omitted)

The undersigned respectfully submit that the injustice done by respondent in failing to exercise his discretion with respect to these taxpayers cries out to this Court for correction as an abuse of discretion. *Cf. Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 981 (5th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978). The fact that respondent apparently did not appreciate that the regulation changed the law certainly does not excuse respondent's failure to avoid arbitrarily depriving holders of prior interests of the right to disclaim free of tax. The significance of such deprivation is put in perspective when one realizes that it is the exercise of the right to disclaim that respondent seeks to tax. Furthermore, respondent even realized during the course of preparation of the regulation that relief was appropriate in this area under Section 7805(b).

In the alternative, entirely apart from Section 7805(b), it is clear that Treas. Reg. § 25.2511-1(c) is merely an "interpretative" regulation, to be relied upon only as follows (*Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)):

> The weight of such [informed administrative interpretative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pro-

nouncements, and all those factors which give it power to persuade, if lacking power to control.

Accord, Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979); *Batterton v. Francis,* 432 U.S. 416, 425 (n.9) (1977); *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-145 (1976); *Morton v. Ruiz,* 415 U.S. 199, 237 (1974); *Daughters of Miriam Ctr. for the Aged v. Mathews,* 590 F.2d 1250, 1258, 1263 (3d Cir. 1978). These cases make clear that the taking of an inconsistent position by an administrative agency severely undercuts the weight to be given to an interpretative regulation; indeed, inconsistency appears to be the primary factor to be weighed in this regard. Respondent was obviously inconsistent in Treas. Reg. § 25.2511-1(c) with his prior position of following *Brown v. Routzahn.* Moreover, that regulation was inept in its attempt to codify *Brown v. Routzahn,* as the litigation which has resulted demonstrates. Thus, although Treasury regulations generally are given consideration and weight by the courts, *see, e.g., Quaker City Iron Works, Inc. v. United States,* 256 F. Supp. 450, 453 (E.D. Pa. 1966), in view of the rather unusual circumstances underlying Treas. Reg. § 25.2511-1(c), that regulation is entitled to no weight.

Furthermore, it is insufficient to say that the regulation applies only to disclaimers made after 1958, rather than disclaimers of interests created after 1958, since under respondent's present interpretation of the regulation holders of pre-1958 interests were unfairly and unjustifiably prevented from ever disclaiming without incurring a gift tax following promulgation of the regulation. Congress recognized this very distinction when it made Section 2518 applicable only to disclaimers of interests created after 1976; that Section is inapplicable to disclaimers made after 1976 of interests created before 1977. *See* Section 2009(e) of the Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520. Only the approach taken by Congress effects a change in disclaimer tax law without adversely affecting prior transactions undertaken in reliance upon then-existing law. *Cf. United States v. Byrum,* 408 U.S. 125, 134-135 (1972).

Finally, respondent has no right to complain that the materials discussed herein have not been raised at the Tax Court or Ninth Circuit levels, as the delay in their being raised was caused by respondent. Surely respondent cannot take advantage of his own acts in such manner.[5] The undersigned described such materials (except the Technical Memorandum, which had not yet been released) in a Motion for Leave to File Brief Amicus Curiae filed with the Ninth Circuit in connection with Petitioners' Petition for Rehearing, but both such requests were denied. Also, the undersigned annexed copies of such materials (except the Technical Memorandum, which again had not yet been released) to a Motion for Reconsideration filed with the Tax Court in *Estate of Halbach v. Commissioner* on September 4, 1980, but that motion was also denied.

In any event, the proper standard to be applied to disclaimants of pre-1958 interests should be the *Brown v. Routzahn* standard of whether they were permissible under State law. If this Court should disagree, the undersigned submit that Treas. Reg. § 25.2511-1(c) was properly interpreted by *Keinath v. Commissioner,* 480 F.2d 57 (8th Cir. 1973), and *Cottrell v. Commissioner,* 628 F.2d 1127 (8th Cir. 1980). The undersigned also wish to express their support for the very well stated arguments contained in Petitioners' Petition for Writ of Certiorari and Petitioners' Brief.

Conclusion

The drafters of Treas. Reg. § 25.2511-1(c) intended to codify *Brown v. Routzahn.* Their intent can be effectuated by reading "transfer" to mean vesting of the right to possession in the remainder interest context.

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5 The Freedom of Information Act request was made on July 21, 1978. The Tax Court entered decision in this case on August 17, 1978. A Motion to Vacate the Tax Court's decision could have been filed for at least 90 days thereafter, long after respondent should have released these documents. *See* Rule 162, Tax Court Rules of Practice and Procedure; 5 U.S.C. § 552(a)(6)(A), discussed at p. 4 herein; and cases cited in Par. 5-6 [2] by Freeman and Freeman, *The Tax Practice Deskbook* 5-61 (1973).

In the alternative, respondent unilaterally changed the rules in the middle of the game for holders of interests created before 1958, contrary to any reasonable notion of equity or justice. The application of respondent's interpretation of Treas. Reg. § 25.2511-1(c) to disclaimers of pre-1958 interests is unfair and constitutes an abuse of respondent's discretion under Section 7805(b).

Finally, in light of the rather unusual background of Treas. Reg. § 25.2511-1(c) discussed herein, that regulation simply does not deserve the interpretative weight given to it by the opinions of the Tax Court and the Ninth Circuit. The dismissal of *Brown v. Routzahn* in those opinions (explicitly by the Tax Court and implicitly by the Ninth Circuit) as having been superseded by Treas. Reg. § 25.2511-1(c) certainly merits re-examination; to allow respondent to overrule *Brown v. Routzahn* in this manner would legitimatize and condone evisceration of a judicial decision with which at least some representatives of respondent did not agree.

Respectfully submitted,

/s/ COLEMAN BURKE
Coleman Burke

/s/ WALLACE B. LIVERANCE, JR.
Wallace B. Liverance, Jr.

/s/ GEOFFREY J. O'CONNOR
Geoffrey J. O'Connor

529 Fifth Avenue
New York, New York 10017
Tel.: (212) 661-6600

Dated: July 9, 1981

APPENDICES

APPENDIX 1

Washington, DC 20224

Person to Contact:
Mr. L. Kirschner
Telephone Number:
(202) 566-4912
Refer Reply to:
TX:D:F:2 78-570
Date: Jul 25 1979

Mr. Geoffrey J. O'Connor
Burke & Burke
30 Rockefeller Plaza
New York, NY 20020

Dear Mr. O'Connor:

This is in further response to your July 21, 1978, Freedom of Information Act request for documents underlying the issuance of Treasury Decision 6334.

We are pleased to enclose selected materials from the files which you requested. We regret that we cannot provide you with the remainder of materials underlying the preparation of T.D. 6334. The materials are considered to be subject to the attorney-client and governmental privileges and are exempt from the disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 by subsection (b)(5). We have also excised a portion of one of the documents and deleted its enclosures. This information is denied as it is considered to be exempt from the disclosure requirements in accordance with 5 U.S.C. 552(b)(3) since it constitutes return information which is specifically exempted by statute (26 U.S.C. 6103).

The enclosed Notice 393 describes the above cited exemptions and sets out the appeal procedures.

Sincerely yours,

(Signature Illegible)
Chief
Freedom of Information
Branch

Enclosures
Notice 393
Selected Documents regarding T.D. 6334

APPENDIX 2

DEPUTY COMMISSIONER OF INTERNAL REVENUE

Washington, DC 20224

Nov. 19, 1979

Mr. Geoffrey J. O'Connor
Burke & Burke
30 Rockefeller Plaza
New York, NY 10020

Dear Mr. O'Connor:

This is in response to your appeal filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, regarding materials relating to preparation of T.D. 6334, 1958-2 C.B. 627. You are not entitled to additional information on appeal. This decision is based upon subsections (b)(2), (b)(3) and (b)(5) of the FOIA.

Subsection (b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This subsection has been construed to exempt those documents normally privileged in the civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The FOIA legislative history reflects that such was the purpose of this exemption. S. Rep. No. 813, 39th Cong., 1st Sess. 2 (1965). The Government's executive privilege and the attorney-client privilege are subsumed by exemption (b)(5). *Sears*, 421 U.S. at 150, 154.

The documents denied pursuant to subsection (b)(5) consist largely of drafts of proposed regulations and revenue rulings. The denied material relates to predecisional advice rendered by Service personnel. It was prepared as a medium for internal debate and discussion in order to improve the quality of the

final published version of the ruling or regulation. This is precisely the type of predecisional advisory material which exemption (b)(5) was designed to protect. Disclosure would have a chilling effect on the Service's decision making process.

The documents at issue do not contain segregable facts. It has been determined that factual information contained in documents is not subject to disclosure when it is so inextricably intertwined with the policymaking process that the very choice of facts reveals the concerns of the agency and the deliberations of staff personnel. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 66-68 (D.C. Cir. 1979); *Koch v. Department of Justice*, 376 F. Supp. 313, 317 (D.D.C. 1974).

To the extent that we have General Counsel Memorandums (GCMs) interpreting T.D. 6334, these documents would also be protected by exemption (b)(5). The Service is presently involved in litigation concerning the availability of GCMs pursuant to the FOIA. *Taxation With Representation Fund v. Internal Revenue Service*, No. 78-2304 (D.D.C., filed December 8, 1978).

Subsection (b)(2) exempts from disclosure records which "are related solely to the internal personnel rules and practices of an agency." Courts have interpreted this subsection to exempt various routing information. Several of the documents denied consist of internal routing and transmittal forms properly exempt from disclosure by subsection (b)(2).

Various documents contain third party taxpayer identifying information. Such information constitutes return information as defined in I.R.C. section 6103(b)(2) and is specifically exempt from disclosure to you by subsection (b)(3) in conjunction with section 6103(a).

The function of the Internal Revenue Service is to administer the Internal Revenue Code. It is the Service's duty to determine the reasonable meaning of various Code provisions in light of the congressional purpose in enacting them. In addition to Treasury decisions, the Service publishes all substantive reve-

nue rulings in order to provide a uniform application of the tax laws. Furthermore, the text of any written determination and related background file document is open to public inspection pursuant to I.R.C. section 6110. Any request for § 6110 material should be submitted to the National Office Reading Room.

Under the provisions of the FOIA, you are entitled to a judicial review of this decision. A complaint may be filed in the United States District Court in the district in which you reside, or have your principal place of business, or in the District of Columbia, the location of the requested records.

Very truly yours,

WILLIAM E. WILLIAMS

APPENDIX 3

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

GEOFFREY J. O'CONNOR, 20 Hilltop Road, Port Washington, New York 11050, Tel.: (516) 883-0133,

Plaintiff,

—against—

INTERNAL REVENUE SERVICE, 1111 Constitution Avenue, N.W., Washington, D.C. 20217, Tel.: (202) 566-4441,

Defendant.

COMPLAINT

Plaintiff, Geoffrey J. O'Connor, by his undersigned attorneys, as and for his complaint herein, alleges:

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522, as amended, to order the production of agency records improperly withheld from plaintiff.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552 (a)(4)(B).

3. Plaintiff, Geoffrey J. O'Connor, is a citizen and a resident of the State of New York, residing at 20 Hilltop Road, Port Washington, New York.

4. Defendant, Internal Revenue Service, is an agency of the United States and has possession of the records to which plaintiff seeks access.

5. On November 14, 1958, the Treasury Department promulgated Treasury Decision (T.D.) 6334.

6. On or about July 21, 1978, plaintiff made a written request to defendant pursuant to 5 U.S.C. § 552 and the regulations thereunder, including Treas. Reg. § 601.701 *et seq.*, for copies of the following: (a) the file of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service underlying preparation of T.D. 6334; (b) the technical memorandum, if any, accompanying T.D. 6334 from the Internal Revenue Service to the Treasury Department; and (c) any other materials underlying preparation or interpretation of T.D. 6334. A copy of said letter is annexed hereto as Exhibit "A".

7. Under letter dated July 25, 1979, defendant provided plaintiff with copies of a limited number of materials selected by defendant from the files and documents requested by plaintiff. All other documents which fell within plaintiff's request were withheld on the purported ground that they were subject to "attorney-client and governmental privileges" and therefore exempt from disclosure pursuant to 5 U.S.C. § 522(b)(5). A copy of said letter is annexed hereto as Exhibit "B".

8. By letter dated August 13, 1979, plaintiff duly filed a written appeal, pursuant to the provisions of Treasury Regulations § 601.702(c)(8), from that portion of defendant's decision dated July 25, 1979 which refused to produce those documents purportedly exempt from disclosure under 5 U.S.C. § 522(b)(5) on the grounds of "attorney-client and governmental privilege". A copy of said letter is annexed hereto as Exhibit "C".

9. Thereafter, by letter dated November 19, 1979, defendant affirmed its earlier decision and rejected plaintiff's appeal. A copy of said letter is annexed hereto as Exhibit "D".

10. Plaintiff is informed and believes that such claim of privilege is unjustified, in whole or in part.

11. Plaintiff is entitled to access to the documents withheld by defendant, and the denial of such access by defendant is without legal basis.

WHEREFORE, plaintiff prays that this Court enter judgment in his favor and against defendant: (1) ordering the defendant to make the documents withheld available as requested; (2) awarding plaintiff his costs and disbursements, including reasonable attorneys' fees, incurred in this action; and (3) granting such other, further and different relief as the Court may deem just and proper.

Dated: Washington, D.C.
February , 1980

KELLY AND NICOLAIDES

By _____
A Member of the Firm
Attorneys for Plaintiff
1511 K Street, N.W.
Washington, D.C. 20005
Tel.: (212) 628-0514

—and—

BURKE & BURKE
Attorneys for Plaintiff
30 Rockefeller Plaza
New York, New York 10020
Tel.: (212) 489-0400

APPENDIX 4

[SEAL]

U.S. Department of Justice
Washington, D.C. 20530

MCF:JJMcC:PAScott:pvv
5-16-1219
CMN: 8012916

May 9, 1980

Geoffrey J. O'Conner, Esquire
Burke & Burke
529 5th Avenue
New York, New York 10017

Re: Geoffrey J. O'Connor v. Internal Revenue Service, Civil No. 80-0495 (USDC D.C.)

Dear Mr. O'Conner:

Enclosed are all but four of the documents at issue. It should be noted that by release of these documents, the Government does not admit that they were wrongfully withheld.

Sincerely yours,

M. CARR FERGUSON
Assistant Attorney General
Tax Division

By: JOHN J. McCARTHY
JOHN J. McCARTHY
Chief, Civil Trial Section
Central Region

Enclosures

APPENDIX 5

U.S. Department of Justice

Tax Division

[SEAL]

Washington, D.C. 20530

JFM:EJS:PAScott:pvv
5-16-1219
CMN: 8012916

June 15, 1981

EXPRESS MAIL

Geoffrey J. O'Conner, Esquire
Burke & Burke
529 Fifth Street
New York, New York 10017

Re: Geoffrey J. O'Connor v. Internal Revenue Service, Civil Action No. 80-0495 (USDC D.C.)

Dear Mr. O'Conner:

Enclosed for your retention are two General Counsel Memoranda (GCM's) and one Technical Memoranda (TM). Deletions have been made for all third-party return information. There is one GCM which is not being released. This GCM relates to a private letter ruling. The decision in *Taxation With Representation Fund* v. *Internal Revenue Service,* 81-1 U.S.T.C., par. 9252 (D D.C., 1981) does not require the release of third-party information and it is our opinion that the withheld GCM contains third-party return information.

Sincerely yours,

JOHN F. MURRAY
Acting Assistant
Attorney General
Tax Division

By: EDWARD J. SNYDER
EDWARD J. SNYDER
Acting Chief
Civil Trial Section,
Central Region

Enclosures

APPENDIX 6

	NAME	SYMBOLS	ROOM	INITIALS
1.	Technical Planning Division (Attention: Mr. Littleton)	T:P	4050	DATE
2.				DATE
3.	CM-952 RECEIVED			DATE
4.	MAY 28 [illegible]			DATE
5.	TECHNICAL PLANNING DIVISION			DATE

FOR:

- ☐ Approval
- ☐ As requested
- ☐ Call me
- ☐ Correction
- ☐ Filing
- ☐ Full report
- ☐ Handle directly
- ☐ Immediate action
- ☐ Initials
- ☐ Necessary action
- ☐ Note and return
- ☐ Recommendation
- ☐ See me
- ☐ Signature
- ☐ Your comment
- ☐ Your information
- ☐ _____
- ☐ _____
- ☐ Prepare reply for signature of _____

Answer or acknowledge before _____

REMARKS (Control File No. M-311
Proposed Revenue Ruling
Re: Director of Internal Revenue
[redacted]

The attached file contains a ruling under the 1954 Code which is proposed for publication in advance of the regulations. Since it involves section 7805(b) of the Code it requires the Commissioner's approval for publication. It was inadvertently forwarded for the Commissioner's signature before submitting it to your office in accordance with established procedures for clearance with the Treasury Dept. Your consideration of the file is now requested. An early reply will be appreciated.

FROM	DATE
H. P. Kraack Chief, Bulletin Branch	5/25/56

(Use reverse side if necessary)

APPENDIX 7

PART I

SECTION 2501.—IMPOSITION OF TAX

Rev. Rul.

> A renunciation, release or relinquishment by a legatee or devisee under a will or by a beneficiary under a policy of insurance constitutes a transfer of property or property rights or interests subject to Federal gift tax under Chaper 12 of the Internal Revenue Code of 1954.

The Internal Revenue Service has recently received inquiries concerning the effect, for gift tax purposes, of State or local law respecting title to the property in cases of renunciations, releases and relinquishments of inheritances and legacies. Three typical cases concerning such transactions are stated below.

1. *A*, a residence [*sic*] of Texas, was legatee under the will of a decedent who died while domiciled in Texas. *A* renounced the bequest and the surrounding circumstances did not indicate that this act was a device or subterfuge to pass title or economic benefits to any particular person or persons.

2. *B*, a residence [*sic*] of North Carolina, was legatee under the will of a decedent who died while domiciled in North Carolina. Immediately on learning of the decedent's death, *B* renounced his legacy. Inquiry as to the persons who, as next to kin, might possibly benefit from such a renunciation disclosed that there were some persons who were heirs and natural objects of the bounty of both the decedent and the taxpayer, and they received benefits as the result of the renunciation; that there were other persons who were the heirs of decedent, but not of the taxpayer, and those persons also benefited by the

renunciation; and that there were other persons who were not the heirs of the decedent, but who were the heirs of the taxpayer, and who, because of the renunciation, lost potential interests in property.

3. *C*, a resident of New York, took out a life insurance policy payable to his wife, but retained the power to change the beneficiary during his lifetime. Subsequently, he and his wife were divorced, but he failed to exercise the power to change the beneficiary. *C* has since died and the wife remarried and refused to accept the proceeds of the policy. In order that the executor could collect the proceeds for the estate, the wife renounced her rights under the policy and released any claims which she might have against the insurance company.

Section 2501(a) of the Internal Revenue Code of 1954 imposes a tax "on the transfer of property by gift * * *." Section 2511(a) of the Code states that "the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible * * *."

Section 86.2(a) of Regulations 108, which is made applicable to the Internal Revenue Code of 1954 by Treasury Decision 6091, C.B. 1954-2, 47, states that the tax will be imposed "whether the transfer is in the trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible" and that "all transactions whereby property or property rights or interest are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax." Section 86.8 of the same regulations states that "transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts * * *."

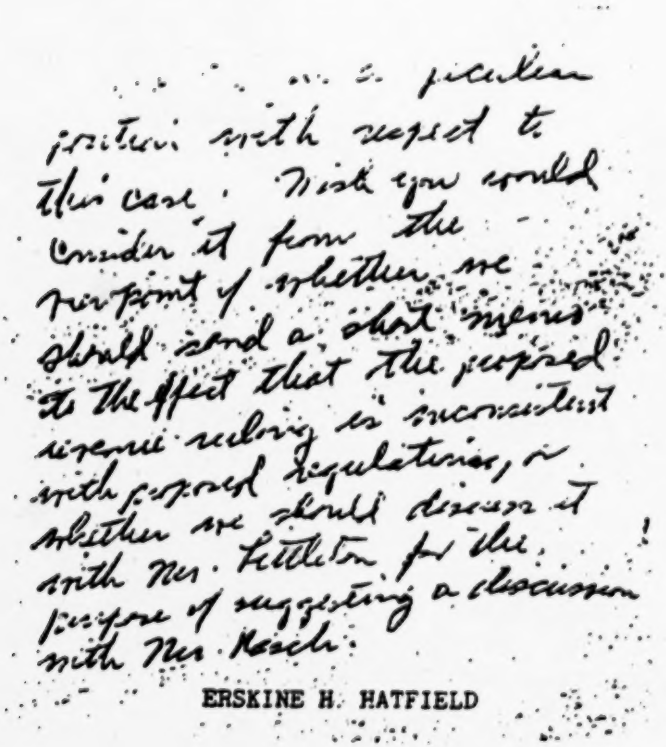
Whether or to what extent the transaction in each of the three cases stated above is subject to the tax imposed by section 2501(a) of the Code does not depend upon title to the property being held by the party at the time he executes the renuncia-

tion, release or relinquishment. As was stated in *Burnet* v. *Murray Guggenheim,* 288 U.S. 280, Ct. D. 636, C.B. XII-1, 374 (1933), "Taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." In that same case, the court also said, "Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title."

In view of the foregoing, it is held that a renunciation, release or relinquishment by a legatee or devisee under a will, or by a beneficiary under a policy of insurance, constitutes a transfer of property or property rights or interest subject to Federal gift tax under Chapter 12 of the Internal Revenue Code of 1954.

With respect to such transactions as are set forth in examples 1 and 2 above, it has been concluded that, under the authority contained in section 7805(b) of the Internal Revenue Code of 1954, the ruling set forth herein will not be applied retroactively with respect to such renunciation which became absolute and irrevocable prior to _____, the date of this Bulletin. The non-retroactive effect of this ruling will not apply to any purported renunciation as set out in transaction 3 above.

APPENDIX 8



... a peculiar
position with respect to
this case. Wish you would
consider it from the
viewpoint of whether we
should send a short memo
to the effect that the proposed
license ruling is inconsistent
with proposed legislation, or
whether we should discuss it
with Mrs. Fullerton for the
purpose of suggesting a discussion
with Mrs. Peach.

ERSKINE H. HATFIELD

APPENDIX 9

OFFICE MEMORANDUM

UNITED STATES GOVERNMENT

T:P:A
CM-952

TO: Director, Special Technical Services Division
Attention: Chief, Bulletin Branch

FROM: Director, Technical Planning Division

SUBJECT: Proposed Revenue Ruling Relating to Section 2501 of the 1954 Code

The proposed revenue ruling (Control File M-311) was scheduled for publication in advance of the regulations, and was referred to this division for consideration in connection with the established procedure for clearance with the Treasury Department.

In the past the Service has followed the decisions of the courts in the cases of *Brown v. Routzahn,* 63 F (2d) 914, and *Hardenbergh v. Commissioner,* 198 F (2d) 63, in determining whether the renunciation of a gift, bequest, or inheritance constitutes the making of a gift. Pursuant to *Brown v. Routzahn,* the Service has taken the position that if the decedent's death did not automatically vest title in the beneficiary, a timely renunciation of the bequest would not constitute the making of a gift. However, pursuant to the *Hardenbergh* case, the Service took the position that if title vested immediately, then the beneficiary by renouncing the bequest gave up something legally owned by him and thereby made a gift. The distinction between the cases is whether title *vested* in the beneficiary. The proposed revenue ruling would, among other things, abolish the distinction and hold that a renunciation

under the circumstances present in the *Brown v. Routzahn* case (where the renunciation became effective before legal title vested in the beneficiary) constitutes the making of a gift.

At the time the gift tax regulations under the 1954 Code were being developed, consideration was given to the inclusion in the regulations of the rules in *Brown v. Routzahn* and *Hardenbergh v. Commissioner.* The proposed published ruling was reviewed by this Division and by the Legal Advisory Staff in connection with the consideration given to this matter. All persons concerned believed that the distinction drawn by these court decisions was artificial, and that renunciations under both sets of circumstances should be treated in the same manner. However, several persons felt that a reversal at this time of the Service's prior position might result in legislation excluding from gift tax renunciations under both sets of circumstances, and, therefore, that the prior position of the Service with respect to cases coming within the *Brown v. Routzahn* decision should not be changed. Mr. Laurens Williams, at that time Assistant to the Secretary (and Head, Legal Advisory Staff) inclined tc this view. As a result language has been inserted in the proposed gift tax regulations adopting the rules in these two court decisions. The language in the proposed regulations (section 25.2511-1 (c)) on the subject reads as follows:

> " * * * The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does [not] immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. * * * "

Inasmuch as portions thereof are not in accord with the language of the proposed gift tax regulations, the proposed

revenue ruling is returned for such disposition as you deem advisable.

_____

Director
Technical Planning Division

Attachment:
Bulletin Branch File

APPENDIX 10

T:P:A
CM-952

Director, Special Technical Services Division
Attention: Chief, Bulletin Branch

Director, Technical Planning Division

Proposed Revenue Ruling Relating to Section 2501
of the 1954 Code

The proposed revenue ruling (Control File M-311) was scheduled for publication in advance of the regulations, and was referred to this division for consideration in connection with the established procedure for clearance with the Treasury Department.

The language in the proposed regulations (section 25.2511-1 (c)) on the subject reads as follows:

> " * * * The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does not immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. * * * "

Inasmuch as portions of the revenue ruling are not in accord with the language of the proposed gift tax regulations, it is

returned with the recommendation that publication be withheld pending promulgation of its final gift tax regulations.

(signed John D.S. Littleton)
EHH

Director
Technical Planning Division

Attachment:
Bulletin Branch File

WSGreen:arw-10-11-57

Initiator	Reviewer	Reviewer
P:A	TPA	T:P
Green	Hamblin	Littleton
		EHH
12/16/57	12/16/57	10/18/57

APPENDIX 11

Mr. Schmid's changes in the gift tax.

On page 22, paragraph (b) should the ninth line of this paragraph read "actuarial methods or actuarial method or other accepted valuation method."

On page 26, paragraph (1) the material in the parenthesis should indicate that the discretion lies with a trustee and the proviso portion of that paragraph should not be deleted.

On page 32, paragraph (c) the renunciation rule should not depend on testacy v. intestacy.

One page 33, paragraph (c) questions the partial disclaimer sentence.

On page 37, paragraph (1) in the first line after the word "property" insert the words "for less than an adequate and full consideration in money or money's worth."

On page 41, delete sentence inserted in margin.

On page 42, paragraph (b) in the third line from the bottom of the page strike the phrase "the gift is incomplete" and insert in its place "there is no transfer".

On page 43, paragraph (c) in line 5 after the word "beneficiarys" insert the word "other than himself", in line 6 place a period after the word "themselves" and strike the remainder of the existing sentence. Insert a new sentence reading "However, if the power is a fiduciary power limited by a fixed or ascertainable standard to name new beneficiarys, other than the donor, or to change the interests of the beneficiary as between themselves, the gift is completed.

On page 43, paragraph (d) valuation problem.

On page 44, paragraph (e) last sentence in the paragraph should not be deleted.

On page 44, paragraph (f) in the first sentence after the word "trust" insert the words "as trustee". In the second line eliminate the word "the" before the word "power" and substitute the word "a" after the word "power" strike the words "as trustee" and substitute therefor "without a fixed or ascertainable standard".

On page 45, paragraph (f) strike the period after the last word in the paragraph and add the phrase "and are not completed gifts".

On page 52, in the insert, insert the words "such as" before the word "is" in the fourth line from the bottom.

On page 54, second line strike "good will" and substitute "value".

On page 71, the sentence beginning "See, however, section 2515 . . . ." which was deleted from the regulations should be reinserted at the end of § 25.2512.

On page 76, paragraph (d)(2) after the word "gifts" the word "correctly" should be inserted. Paragraph (d)(4) after the word "gifts" the word "correctly" should be inserted.

In (d)(2) and (d)(4) of the same page the word "proper" should be stricken and substitute the word "spouse's".

On page 87, the last sentence in paragraph (2) should be put back in the regulations.

LAIRD BELL
BARRELL B. BOYD
THOMAS L. MARSHALL
WALTER T. FISHER
F. C. E. LUNDGREN
GLEN A. LLOYD
DAVID A. WATTS
CARLETON BLUNT
WILLIAM H. HADDAD
KENNETH MCCRACKEN
WILLIAM G. BURNS
MARK B. MASSEL
CHARLES E. HERZOG
SAMUEL M. MITCHELL
JAMES CONGER
JAMES P. JOHNSON
GEORGE W. WINDHORST, JR.
CHARLES T. MARTIN
THOMAS R. MCMILLEN
RAYMOND P. JANICEK
ROBERT E. MASSEY
GLENN W. MCGEE, JR.
ARTHUR HEDDY
MACK H. WHITNEY II
THOMAS B. STIDOLT
MALCOLM A. CHANDLER
R. JAMES GORNLEY
DAVID WESTFALL
JAMES T. RHIND
J. WILLIAM HAYTON
LEIGH R. GIGNILLIAT III

BELL, BOYD, MARSHALL & LLOYD
135 SOUTH LASALLE STREET
CHICAGO
3

Air Mail

Treasury Decision

December 7, 1956

RECEIVED IN
U-6310-L
DEC 10 19[illegible]
CHIEF COUNSEL'S OFFICE
FOR THE
INTERNAL REVENUE SERVICE

Mr. Paul Schmid
Office of the Chief Counsel
Room 5229
Internal Revenue Building
Washington 25 D.C.

Reg 7 Reg

Dear Paul:

I have finished going over the Gift Tax Regulations. Since some of my suggestions are really in the nature of questions, I thought it would expedite things if I sent you a memorandum of them, so that we can resolve them between us before I return a marked copy of the regulations to the Treasury. I am therefore enclosing several copies of such a memorandum. I suggest that if possible you telephone me after you have considered them.

I am also enclosing a draft of a proposed expediting memorandum.

I am sorry I have been a little longer about this than I had hoped to be.

Sincereiy yours,

James P. Johnson

JPJ jes
Air Mail
Enclosures

copy to: Mr. Raphael Sherfy

APPENDIX 12

U. S. TREASURY DEPARTMENT

Washington 25

Oct. 1, 1958

T:P:WE
R-346-1

MEMORANDUM FOR: Honorable Robert B. Anderson
Secretary of the Treasury

SUBJECT: Proposed Treasury decision—Regulations under provisions of the Internal Revenue Code of 1954 relating to the gift tax.

There is transmitted herewith, with the recommendation that it be approved, a proposed Treasury decision which would issue the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B of the Internal Revenue Code of 1954. The regulations contained in the proposed Treasury decision are applicable to gifts made on or after January 1, 1955.

The proposed Treasury decision is substantially the same as that published as notice of proposed rule making in the Federal Register of January 3, 1957 (22 F.R. 53). In those areas where the Estate Tax Regulations and the Gift Tax Regulations interpret similar provisions of law, the Gift Tax Regulations have been conformed to agree with the positions taken in the Estate Tax Regulations. Among the provisions of law pertaining to the estate tax and the gift tax which are similar are those relating to valuation of property, powers of appointment, charitable deductions, marital deductions, and certain administrative provisions relating to the time and place for filing returns and paying tax, the keeping of records, etc. In the case of the Estate Tax Regulations certain material found in the notice of proposed rule making was removed from the final

regulations because of doubt as to the accuracy of the material, and certain subjects were not treated (or, if treated at all, were referred to in general terms only) because of lack of agreement as to the precise rule to be followed. Where such material and subjects also come within the scope of the Gift Tax Regulations, the same action was taken as in the case of the Estate Tax Regulations. Among these subjects are transfers for less than full consideration (including property settlements and transfers for support which do not come under section 2516), and the valuation of shares in open-end investment companies. A few significant changes were made in the portions of the proposed regulations which pertain to subjects peculiar to the gift tax. These changes may be summarized as follows:

Disclaimers.

Paragraph (c) of section 25.2511-1, as set forth in the notice, discusses certain acts which constitute the making of a gift. Among the acts discussed is the renunciation, or attempted renunciation, of property, or a property interest, passing from a decedent. In what was intended to be the application of the rules in *Brown v. Routzahn* (1933) 63 F. 2d 914, cert. denied 290 U.S. 641, and *Hardenbergh v. Commissioner* (1952) 198 F. 2d 63, cert. denied 344 U.S. 836, it was stated that where title to the property did not vest in the beneficiary or heir immediately upon the decedent's death, the renunciation of the property did not constitute the making of a gift, but that where title vested in the beneficiary or heir immediately upon the decedent's death, the act of the beneficiary or heir in giving up what passed to him from the decedent constituted the making of a gift. Furthermore, in the notice the position was taken in paragraph (c) that a partial renunciation of property could not be made. Protests on these provisions were received. After reviewing these protests, we have reconsidered our position and now believe that the proper distinction between these two court cases turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property which passed from the decedent. Accordingly, we have revised paragraph (c) of sec-

tion 25.2511-1 to reflect this change of position. Also, we have abandoned the position that a partial renunciation cannot be made, and paragraph (c) has been further changed to recognize a partial renunciation where it is effective, as such, under local law.

Annual exclusions for gifts to minors.

In general, section 2503 (b) authorizes an annual exclusion of $3,000 for gifts of present as against future interests. Section 2503 (c) then provides (in part) that a gift of property to a person under 21 years of age will not be considered a gift of a future interest in property if the property "may be expended . . . for the benefit of" the donee before his attaining the age of 21 years. In the notice of proposed rule making, it was indicated by way of example that the above-quoted condition of the section might be satisfied even though the trustee or custodian of the property did not have the unrestricted discretion to determine the amount and purpose of any expenditure for the donee. This example has been modified in order to point out that the trustee or custodian must have unrestricted discretion in these respects.

Section 2503 (c) further provides that in the event the donee dies before attaining the age of 21 years, the property must be payable to his estate or "as he may appoint under a general power of appointment." The position is taken in the notice that the power of appointment must be validly exercisable by the donee under the applicable local law (taking into account the fact that the donee is under 21 years of age). It is our opinion that Congress did not intend that the condition of the section relating to the power of appointment be satisfied by setting up a power of appointment in the donee that could never be used. Certainly, a literal reading of the statute supports such position, i.e., if the power was not exercisable, the property would not "be payable . . . . as [the donee] may appoint." Furthermore, it is our understanding that the purpose of section 2503 is to allow the annual exclusion for gifts to minors when they substantially own the transferred property (because gifts to adults receive such treatment). The minors do not substantially

own the transferred property if, when they die under 21 years of age, the donor can control the disposition of the property (as he can if the minor is given a nonexercisable power, with gift over in default of appointment).

Only a few protests were received which objected to the position taken in the notice regarding the power of appointment. Such protests contain two main arguments. First, it is contended that the position taken in the notice is inconsistent with Rev. Rul. 55-518, C.B. 1955-2, 384, which would include in a decedent's gross estate under section 2041, the value of property over which the decedent "has at the time of his death a general power of appointment" even though such power is not exercisable because of the decedent's incompetency. It is our thought that the position in the notice is proper and that it can be reconciled with the ruling, since the language contained in section 2503 (c) is different from that contained in section 2041 (see above-quoted material). However, if it should be determined that the position taken in the notice is inconsistent with Rev. Rul. 55-518, reconsideration could be given at a later time to the position in the revenue ruling, taking into account other related problems in the field of estate taxation.

Secondly, it is contended that Congress knew that persons under the age of 21 cannot generally exercise powers of appointment and that the inclusion of the power of appointment provision was intended to cover cases where minors were given nonexercisable powers. This argument does not seem convincing to us, especially since in some States powers of appointment can be exercised by persons under 21 years of age (e.g., some States allow a person 18 years of age to exercise powers of appointment).

Commissioner

Attachment

WSGreen:jk:10-1-58

[At least one dozen sets of initials and dates are at the bottom of this page.]